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THE UNIVERSITY OF ALBERTA

THE INTERNATIONAL LAW OF THE SEA AS AN INSTRUMENT OF ECONOMIC DEVELOPMENT : AN AFRICAN PERSPECTIVE.

by

CAROLINE E ETSIBAH

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A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA
FALL 1987

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ISBN 0-315-40850-2

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....

~~Supervisor~~

....

Larry Pratt

Linda C. Reif

....

Date 14 Oct 87

Dedication

Dedicated to my parents.

Abstract

It is almost half a decade now since the United Nations Convention on the Law of the sea was signed at Montego Bay. It has not yet received one half of the number of ratifications necessary to bring it into force. The concept of the sea and its resources as the common heritage of mankind, a central theme of the Convention has been a thorny issue in international legal debates. However, most contemporary international lawyers seem to agree that the well-being of international society at large, depends on fostering the development of the newly independent states. The past two decades have witnessed a surge in the number of sovereign states particularly from Africa, which have become members of international society. These nascent states have made demands on the existing structure and have pushed for changes and adjustments to achieve a balanced society in which all the members are equally sovereign in the material terms. A way of achieving this is seen by most African states as attaining economic independence. For although colonialism has ended, it is a notorious fact that African domestic economies hang on to the apron strings of their colonial masters.

The prospect of the oceans of the world becoming an important source of food, minerals and energy for a rapidly developing world is fast becoming a reality, with increasing technological developments to enable man to tap earth's last frontier. With the growing number and complexity of sea uses

comes the search for an internationally agreed upon code of sea law: a code which not only lays down technical rules of law, but also takes into consideration all the conceivable aspects of marine usage by humanity ;environmental, delimitation jurisdiction, food, and energy.

In the following chapters an attempt is made to evaluate the results of the herculean endeavour undertaken at the third United Nations Conference on the Law of the Sea from the perspective of African States, who as new entrants to international society have hitherto not been much involved in contemporary international law-making.

Acknowledgements

I wish to express my gratitude to Professor L. C. Green of the University of Alberta for acting as thesis supervisor and for his invaluable comments, advice, guidance and encouragements.

I am also grateful to Miss Linda Reif for consenting to be the faculty examiner and for her interest in my topic. Professor D. Pharand kindly agreed to sit on my examination committee, and offered invaluable comments. I record my sincere thanks to him.

I also record my greatest appreciation to Dr. L. Pratt who kindly agreed to act as external examiner and offered some helpful comments. Finally, I am indebted to the staff of the Law Library for kindly assisting me to obtain all the documents and information I needed.

LIST OF ABBREVIATIONS

A.J.I.L.	American Journal of of International Law.
Ann. Fr.	Annuaire Francais de droit international.
A.A.L.C.C.	Asian-African Legal Consultative Council.
B.Y.B.I.L.	British Yearbook of International Law.
B.S.F.P.	British Foreign and State Papers.
C.L.P.	Current Legal Problems.
E.C.A.	Economic Commission for Africa.
Fulton.	T.W.Fulton, The Sovereignty of the Seas.
C.T.S.	Consolidated Treaty Series.
I.L.C.	International Law Commission.
I.L.M.	International Legal Materials.
I.J.I.L.	Indian Journal of International Law.
Inter'l Orgn.	International Organisation.
C.L.P.	Current Legal Problems.
J.M.L.C.	Journal of Maritime Law and Commerce.
J.W.T.L.	Journal of World Trade Law.
N.D.	New Directions in the Law of the Sea.
Nat. Res. Jour.	Natural Resources Journal.
O.D.I.L.A.	Ocean Development and International Law.
Phil.Ybk. of I.L.	Phillipine Yearbook of International Law.
O.A.U.	Organisation of African Unity.
Recueil.	Recueil de Cours.
R.G.D.I.P.	Revue Generale de droit international Public.
San Diego L.Rev.	San Diego Law Review.
Stanford L. Rev.	

	Stanford Law Review.
U.N.C.L.O.S.	United Nations Conference on the Law of the Sea.
U.N.T.S.	United Nations Treaty Series.
U.N.L.S.	United Nations Legislative Series.
U.N.I.T.A.R.	United Nations Institute for Training and Research.
U.K.T.S.	United Kingdom Treaty Series.

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I. INTRODUCTION

After close to a decade of diplomatic conferences from Caracas to Geneva to New York, and after exactly twelve sessions, the Third United Nations Conference on the Law of the Sea (UNCLOS III), in December 1982, finally produced a rather complex and voluminous treaty on the law of the sea. Since 1945, and particularly during the past two decades, this area of international law has been of significant interest to a broad spectrum of people: from international jurists to naval planners and investors, politicians and diplomats to environmentalists on the one hand; and the third world countries comprising African, Arab, Asian and Latin-American groups, (generically referred to as the Group of 77) most of whom are grappling with diverse economic and political problems, and the industrialized and developed world on the other.

Judging from the broad spectrum of interests at stake, the task that the conference faced was, to say the least, a very difficult one. It is therefore difficult to discern the driving force behind what is perhaps 'one of history's most prestigious assembly of jurists and diplomats ever convened'. It does, however, affirm one thing: mankind's unending search for the unknown. In this century, the mystery that surrounds the earth's biggest territory has been unravelled, thanks to modern technology. That over a hundred states have compromised to a large extent their national interests in favour of a global desire to share the known and unknown treasures of the seas, is one thing. The real crux of the matter is how this treaty (when it does come into effect) is going to ensure that each and every nation, large or small, rich or poor, weak or strong, will have its "fair share" of the cake.

The third world countries have an urgent desire to see the treaty come into force, probably due not so much to what it has in store for them, but rather to assuage some of the feelings of insecurity they nurture as late entrants to the international community of nations.

The main thrust of this thesis is a functional appraisal of the natural resource policies of the law of the sea in the eighties and the probable impact of the treaty on the traditional and new uses of the oceans, strictly from the point of view of African Third World States.

II. CHAPTER ONE

A. MEDIEVAL ORIGINS OF MODERN MARITIME LAW

The sea, which covers about 72% of the earth's surface has always been one of mankind's greatest assets, the mystery of the expanse and treasures of which have been a source of amazement, conceptualisation, as well as great thinking for man. Man's conception of the sea changes with his evolutionary processes and progress, thus the concepts and principles which form the basis of the 'law of the sea', be they customary or conventional must be seen in the light of society's development in space and time. It is in this regard that the history of maritime practice is here traced from earliest times.

Although contemporary writers on international law often deny the existence of any kind of 'international law', as the term is generally defined[1] during the era of the Ancient Greeks, Phonicians and Carthaginians, and attribute the origins of the modern rules of conduct binding on states in their relations inter se to the middle ages and particularly to the works of such classicists as Albericus Gentilis (1552-1608), Hugo Grotius (1583-1645), Francisco de Vitoria (1480-1546) and others, they have often referred to the ancient maritime practices of the Rhodians and Greeks, particularly in their discussions on the law of the sea[2]. It is now undisputed that, for that part of modern international law relating to maritime affairs, there is evidence of a long standing body of rules and practices which guided maritime activities, both in peace and war during antiquity. These were not based on notions of sovereignty or territoriality, but rather on commercial expediency and necessity, since commerce was then the most important and predominant activity[3]. The oldest known codification of these maritime practices is found in the Rhodian Sea Law which is said to have been codified as far back as 700 A.D. to regulate Greek Maritime Commercial relations.[4]. Subsequently, other codes, containing more detailed rules developed in various parts of Europe to regulate maritime commerce. Thus the Consolato del Mare[5] developed in Spain and the well known Rolls of Oléron[6] which consisted mainly of actual judgements delivered by the maritime courts of the little Atlantic island whose name it bore also evolved during the same period. In the Baltic, there developed the sea laws of Gothland, commonly referred to as the laws of Wisby[7] which were greatly influenced at least in content by the Rolls of Oléron. All of these codes proved particularly useful to seafarers as well as to the consuls who were charged with the adjudication of maritime disputes. However diverse in space and time, these codes are all said to exhibit a striking identity of character, in that they were not imposed by the authority of any sovereign or divine ruler, but represented customs of the sea which enjoyed a permanent acceptance among seafarers[8].

---

[1] International law is normally defined as "rules of conduct which modern civilised states regard as being binding on them in their relations with one another". See: W.E. Hall, *A Treatise on International Law.* (1880), 8th edn., A. Pearce-Higgins (ed) 1924, Oxford: Clarendon Press, p.1., H. Wheaton, *History of the Law of Nations.* (1885) Gould, Bank & Co. New York. p.69. But there is authority and evidence of international practice and relations in the age of antiquity. See: T.A. Walker, *A History of the Law of Nations* (1899) Cambridge, Vol.I, pp.1-17, 30-56, 58-112., C. Phillipson, *International Law of Ancient Greece and Rome* (1911), Macmillan and Co. London. Vols. I and II. See also H.B. Leech, "Ancient International Law" in (1883), Vol.43, *Contemporary Review,* pp.260-274; Vol.44, pp.890-904. F. Laurent, *Histoire de Droit des Gens et des relations internationales.* (1850). Tome, I. For a modern view, see J.L. Brierly, *The Law of Nations*, (1955), Oxford, Clarendon Press, pp.1-6.

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[2] See for example, C.J. Colombos, The International Law of the Sea. (1959) Longmans, pp.29-33; J.H.W. Verzjil, International Law in Historical Perspective, (1968) Leyden. Vol.I, p.436; T. Twiss, The Law of Nations, (1884) Oxford. Clarendon Press. [1985 Reprint, Rothman & Co., Colorado], Vol.I secs:172-173

[3] J. Reddie An Historical View of the Law of Maritime Commerce, (1841) Edinburgh, Blackwood and Sons. 1973 Xerox copy of University Microfilms, Ann Arbor. See also, text to notes (1) & (2) *supra*

[4] According to McFee, the first existing copy of this rests in the Vatican Library whilst the British museum and the Bodleian Library at Oxford, each retains a copy of the thirteenth century edition. See W. McFee, The Law of the Sea. (1950) New York. pp. 35-60. However, W. Ashburner, in preparing his The Rhodian Sea Law in 1909 made reference to

---

[4] (cont'd) several manuscripts all of which had documented the Rhodian Code. He specifically mentions the Vaticanus Graecus 2075 of the eleventh century. Probably this is what McFee was referring to especially since Reddie asserts that historical research has proved that the original Greek text did not survive the barbarism which erupted upon the decline of civilization at the time. See J. Reddie *op. cit*. pp. 63-77. Consequently, none of the various manuscripts can be said to be the original.

[5] This represents a complete collection of maxims and usages for regulating maritime trade which was adapted to the state of society then. It is generally regarded as the earliest general code of maritime law in Europe now in preservation. See Reddie *op. cit*. pp. 171-207. See also. S.S. Jados, Consulate of the Sea and Related Documents. (1975) University of Alabama Press.

[6] Reddie, *op. cit*. pp. 207-229.

[7] *ibid*. pp. 230-244.

[8] Twiss, note (2) *supra*. pp. 284-288. See also, Reddie, Researches, Historical and Critical in Maritime International Law. (1844-1845) Edinburgh, T. Clark. Vol. I. pp. 36-83.

Moreover, almost all of these later codes are said to have originated from the Rhodian Sea Law. Thus Welwood[9] in a preface to his work in 1609, states that:

> Concerning the argument of seafaring governments, so far as by any monuments can be observed, our beginning must be at the inhabitants of the Island called Rhode, situate within the Mediterranean Sea...[t]he dwellers whereof....were most famous for shipping and sayling...(and) surpassed all other Nations in knowledge of equitie in marine business; which they manifested by making sealawes.
>
> For, the very Emperors of Rome,...did referre all seafaring debates and controversies to the judgement of the Rhodian Law.[10]

There is also evidence of some kind of an accepted or systematised maritime practice in the Orient and Far Orient, particularly in the Indian Ocean. In the Arabian peninsula also, historical researches have revealed the existence of an Islamic conception of a law of nations among Islamic territories and the Near East to regulate commercial transactions between moslems and non-moslems. Thus Khadduri, in his introduction to the translation of the work of an eighth century Moslem jurist, Shaybáni, asserts that in the early days, there was in existence in the Near East, a law governing the relationships among nations[11]. Since commerce and war were the most important activites of this period, and the theatre for both was largely maritime, it stands to reason that the 'siyar'--the Islamic law of nations, which was developed by islamic jurists would contain certain accepted principles of maritime commerce, although Shaybáni's 'Siyar' deals mainly with traditions relating to the conduct of war[12]. It has therefore been alleged, and rightly so, that the emergence of the 'Siyar' among the early Arab nations had an end or purpose common also to the evolution of Western International Law, namely, to mitigate the ravages of war by providing rules to regulate the conduct of warfare, as well as to promote peaceful existence among nations.[13]. It is however obvious from the various writings[14] on Islamic International law that maritime practices and usages were not central to the 'siyar'.[15]

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[9] He was the Scottish Lawyer who took up the task of replying to Grotius' Mare Liberum published 1608, at the time when England's fisheries were being threatened by the Dutch. He is said to be the first author to clearly enunciate and insist on the principle that the littoral State had exclusive right to fisheries along its coasts, and that it in fact had a usufruct in the adjacent seas. See T.W. Fulton, The Sovereignty of the Seas. (1911) Edinburgh, Balckwood & Sons. [1976 Reprint, New York] pp. 351-354.

[10] W. Welwod. An Abridgement of all Sea-Lawes. (1613) London. The edition used here was republished in 1972 by Theatrum Orbis-Terrarum Ltd. and Capa Press Inc. See also Reddie, An Historical View of the Law of Maritime Commerce. *op. cit.*, p. 133 et. seq.

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[11] M. Khadurri, (transl.), The Islamic Law of Nations. (1966) Baltimore. p.3. See also Walker, T.A. *op. cit*. secs. 44-5, 88-112.

[12] Khadurri, *ibid*. p. 75

[13] See M.F. Al Ghunaimi. The Moslem Conception of International Law and the Western Approach. (1968) Martinus Nijhoff. p. 4.

[14] See notes (11) & (13) *supra* See also Nussbaum, A Concise History of the Law of Nations. (1947) rev. ed. 1954, New York. MacMillan Co. pp. 51-54.

[15] This is not surprising since the core of Islamic doctrine on international relations is premised on the existence of a latent state of war between Moslems and infidels. However, against this notion of latent war is weighed the sojourn of

In the far East however, there is much more cogent evidence of maritime practices. Phillipson makes a brief mention of this, by referring to the Ancient Code of Manu which has provisions regulating commerce, not only among the Indianized nations, but also in their dealings with the Middle East and Africa. In his treatise on the Orient, Laurent has observed that:

> *le code de Manou ne prohibe pas le traffic maritime, il en consacre même tacitement la legitimaté en reconnaissant force obligatoire aux contracts qui y sont relatif*[16]

Elsewhere, he states that:

> *les indiens parraissent déjá comme peuple navigateur dans les Vêdas, le plus ancien de leurs livres sacrés.*[17]

Later works affirm that navigation and commerce in the Indian Ocean were carried on even before western explorers and merchantmen arrived[18] and,

---

[15](cont'd) a Moslem in foreign lands for purposes of commerce and other intercourse. Thus, it will be realised that the law of treaties also formed an impressive part of Islamic law since Moslem leaders had to negotiate with Christian powers, willy-nilly, in order to protect their believers. However their maritime practices may have evolved mainly from the Mediterranean and Indian ocean.

[16] Laurent, note (1)*supra*. Tome I. pp. 105-106.

[17] *id.*

[18] See for example: A. Toussaint, History of the Indian Ocean (transl. by J. Guicharnand.) 1966, Chicago Univ. Press. pp. 1-10, C.H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies. (1967) Clarendon Press. pp. 60-65, R.P. Anand, Origin and Development of the Law of the Sea (1983) Maritinus Nijhoff. pp. 12-34.

> freedom of the seas and navigation of ships were never interfered with, controlled or monopolized by anybody. Persians, Arabs Indians and Ceylonese, Chinese and people of Southeast Asian states all used the seas for trade and enjoyed its bounties in perfect peace, disturbed only casually by pirates who were considered enemies of all and sought to be suppressed by the powerful kings near their coasts.[19]

Apart from this long evolution in the Indian Ocean of a tradition of freedom of navigation even before contact with Europe, several Indianized states were by the fifth century flourishing and several entrepôts and trade centres had been established and freedom of navigation and commerce was a recognized rule[20].

It must however be observed that most of the maritime rules that developed at this time regulated mercantile maritime affairs as well as belligerent conduct, because the hallmark of that era was commerce in peace time, and war.

Even today, we find that a large body of international rules, whether judicial, customary or conventional relating to naval warfare, safe passage, and contraband to name only a few, have their origins in these old maritime codes, notably the Consolato del Mare,[21] "whose authority" according to Azuni is above all.[22]. Thus Lord Esher in the case of The Gas Float Whitton No. 2, stating that the laws of the Rhodians or Oléron were not themselves any part of the Admiralty law of England, nevertheless observed that they do

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[19] Anand, *op. cit.* p. 20.

[20] *ibid.*

[21] With its 252 chapters grouped under 14 headings, the Consulate of the sea constitutes a major source document for such principles of modern maritime law as those relating to contracts of affreightments, charter parties and bills of

> contain many valuable principles and statements of marine practice which together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court. [23]

Although it is being asserted here that these ancient societies had clearly defined maritime rules and regulations, these lacked a precise legal doctrine as to the actual status of the sea, or as to the right of men to appropriate products or parts thereof. The exercise of maritime jurisdiction was strictly in respect of the intercourse among legitimate seafarers as well as pirates who were everywhere considered as animals even during the Graeco-Roman era,[24] and as Judge Moore stated in his

---

[21] (cont'd) lading.

[22] D.A. Azuni, Droit Maritime de L'Europe. (1805) Paris. Vol. I, p. 392.

[23] [1896] P. 42, at 48 (C.A.)

[24] According to Phillipson, the Greeks abhorred pirates and considered their feat glorious See Phillipson, *op. cit*. Vol. II. p. 370. The definition of piracy *jure gentium* has had a controversial history. Article 15 of the Geneva Convention on the High Seas, 1958, which is now generally considered to be expressive of customary international law rules, lists a number of acts and circumstances under which piracy will occur. See 450 UNTS, 11; See also, Churchill, *et. al.* New

dissenting opinion in *The S.S. Lotus*:

> in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come.
>
> Piracy by law of nations, in its jurisdictional aspects is *sui generis*. [I]t is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish.[25]

In effect, there were no undertones of claims to sovereignty over the actual seas. The lesson to be taken from the above is simply that the law of the sea is in a process of constant transformation and that at any particular point in time, the rules and practices are a direct reflection of the thought process and activities of

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[24] (cont'd) *Directions in the Law of the Sea* (N.D.) Vol. I. p. 257; Article 101 of the 1982 Treaty on the Law of the Sea, (LOSC) 1982 Vol. 21 *I.L.M.* 1261. For judicial opinions, See, *The Magellan Pirates* (1853) 1 Sp. Ecc and Ad. 81; *Re Piracy Jure Gentium* [1934] A.C. 586. See also M.S. McDougal, W.J. Burke, *The Public Order of the Oceans.* (1962) Yale Univ. Press. New Haven. pp. 805-823, , 875-9; J.G. Starke, *An Introduction to International Law.* (1977, 8th edn.) Butterworths, London. pp. 34, 307-12.

[25] PCIJ, Ser. A. (Pt. II) No.10. (1927) 65 at 70, 2 Hudson World Court Reports. 23, at 68-9.

mankind. Consequently, even if the substantive rules and practices are irrelevant to modern maritime activty, the force behind their evolution is still very important.

B. DEVELOPMENT OF MODERN INTERNATIONAL LAW - POST 1254[26]

For most contemporary writers on international law[27], the era after the fall of the Roman Empire, when there was a movement from the unity and universality of Europe to one of diversity and nationality marks the beginnings of modern international law. However as far as the law of the sea is concerned, this period can only be described as another milestone in its development and not as the evolution. The activities of this period culminated at the turn of the eighteenth century, in the doctrinal basis which we now have for asserting claims over the hydrospace. This epoch also marks a divorce between "modern maritime law" which normally regulate commercial maritime transactions[28] which rules had by then been firmly established either by custom, treaty or judicial opinions[29] on the one hand, and an emerging international law of the sea, the basis of which was an extension of territorial sovereignty seaward. Since maritime mercantile matters were being dealt with by principles laid down in the various maritime codes, the main legal controversies now centred around claims of sovereignty asserted by the new nations of Europe. This period witnessed various more or less anarchic assertions and claims of territorial sovereignty over far away lands which often resulted in actual wars. But there was another kind of war being waged alongside this scramble for territories overseas. This latter, referred to as the "Battle of Books" gave birth to two important doctrinal basis for modern international law of the sea - *mare clausum* and *mare liberum*.[30]

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[26] This section entails a discussion of the historical and economic antecedents which culminated in the doctrines of *Mare Liberum* and *Mare Clausum* by the eighteenth century onwards. What is generally referred to as the Grotius/Selden controversy, being the fulchrum of the dialetics of this period, is conveniently discussed in the next section. Thus it will be observed that this section merely sets the stage for the next, and must be therefore read as such.

[27] For example, A. Wheaton, *op. cit.*, where he states that the Peace of Westphalia 1648, is properly chosen as the epoch from which to deduce the history of the modern science of international law. See also, P. Fauchille, Traité de Droit International Public. (1922) Rousseau *et. cie.* Tome I, p. 75. However, some writers prefer the view that the Westaphalia Treaty was a great influence on the history of the law of nations rather than the beginning. See, Starke, *op. cit.* p. 10. and Brierly, *op. cit.* p. 28. who feels that attributing the accolade of "Father of the Law of Nations" to Hugo Grotius, is an exaggeration of the originality of his illustrious writings during the seventeenth century. See also, L. Gross, "The Peace of Westphalia, 1648-1948." in Essays in International Law and Organisation (1984) Transnational Publishers Inc., pp. 3-21. where sharing the views of Brierly and Starke, he evaluates the impact of the peace of Westphalia on the subsequent development of International Law.

With the emergence of independent national states after the fall of the Roman Empire, there was an expansion in commerce, which was due partly to the struggle by the new states to achieve national identity. The only way to achieve this was through the establishment of trade monopolies. Thus not only was the acquisition of territories in the New World and Far East necessary, it was also important to protect the sea routes which led to these trading posts. Probably, what triggered subsequent controversies about sovereignty of the seas was a Papal Bull issued in 1493. This was long before the Dutch and English joined the 'bandwagon' of explorations and expeditions. Subsequent upon the voyages of Bartholomew Diaz, Vasco da Gama and Christopher Columbus, the Pope divided the undiscovered world between Spain and Portugal.[31] Spain, by virtue of this division was given exclusive right of navigation in the Western Atlantic, Gulf of Mexico and the Pacific Ocean, whilst Portugal acquired this right in the Atlantic South of Morocco and in the Indian Ocean. Such a division may seem preposterous in the present day, but even then, it was clearly inconsistent with the prevalent Justinian[32] doctrines of the sea according to which, the sea, being a *'res communis humani iuris'* was open to the use of all men *iure naturali* and was owned by none. The only right which was exercisable in respect thereof was that of jurisdiction to protect men of war and commerce from pirates.[33].

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[28] J. Reddie, note (3)*supra*

[29] For example, rules as found in the Consolate del Mare and the British Black Book of Admiralty. See also, T.Twiss, (ed.) The Black Book of Admiralty. (1871) London.

[30] These doctrines are discussed below.

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[31] A year later in 1494, both nations by treaty effected changes in this papal boundary. See Papal Bull Inter Caetera, May 4, 1493; Treaty of Tordesillas, June 4, 1494, in F.G. Davenport, *European Treaties bearing on the History of the United States.* (1917). Carnegie Institution, Washington, D.C. pp. 71, 75-77, 84, 93-100. See also, L.S. Stavrianos, *The World Since 1500 - A Global History* (1966) Englewood Cliffs, N.J. p. 101.

[32] Institutes, Lib II, Tit. I, 1, 5. See also note 44 *infra*

[33] P.T. Fenn, "Justinian and the Freedom of the Seas." (1925). 19*AJIL* pp. 716-722. H.S. Maine, *International Law*. (1888). New York, pp. 76-77. Fulton, *op. cit.* pp. 1-5.

Thus prior claims and assertions of sovereignty by Venice over the Adriatic[34] and Genoa over the Ligurian Gulf, must be understood in the light of this policing power. Since both cities were flourishing commercial centres, it was perhaps not unreasonable that they should secure their economic interests in view of the accelerated piracy that marked this period.

However, the papal division, and claims made pursuant thereto were rigorously opposed from various quarters. Queen Elizabeth, who at the time was bent on securing the liberty of trade and fishery for her subjects, defended the exploits of Sir Francis Drake on the so called 'spanish seas' in 1580, against the complaints of the Spanish ambassador, Mendoza, and declared that she did not recognise the prerogative of the Bishop of Rome as binding on princes who owned him no obedience. Thus her subjects were entitled to navigate the vast oceans, the use of which was common to all.[35] Francisco de Vitoria, considered as the Spanish

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[34] It appears however that Venice had a peculiarly strong claim over the Adriatic at the time, which claim was recognised by the Popes and other states. In fact the papal nuncio and representatives from those other states attended the ceremonial espousal of the Adriatic every Ascension Day. By this symbolic ceremony, the Duke of Venice was rowed in the magnificently gilded state barge, the Bucentur, to the Channel of Lido, where by casting a ring into the water, he exclaimed "Desponsamus te mare in signum veri perpetuique dominii. we espouse thee, O Sea, in sign of a real and perpetual dominion." See Boroughs, Sovereignty of the British Seas. T.C.Wade (ed) 1920 , W. Green and Sons. Edinburgh, p. 6. n.1.; Fulton, *op. cit*. p. 4 n. This ceremony continued until the fall of the Republic in 1797.

[35] Camden, Annales Rerem Anglicarum. (1717) Vol. 3. 359. 1975 Univ. Microfilm : Ann Arbor - N.Y.; Fulton, *op. cit*. pp. 105-107. Also according to Fauchille, *"Le pouvoir du saint-siége est discuté même par les souverains catholiques*

'father of international law' also questioned the authority of the Pope to act as an *orbis dominus.*[36] The protests from the English quarter were particularly strong because of the strain on fisheries as a result of the Reformation and the thriving Dutch fisheries. The suppression of monasteries and the relaxation of the ecclesiastical rule on Lent and fasting, had led to a decline in 'fish days' and the English fishing industry was facing serious problems.[37] It is against this background that English maritime pretensions were set in the sixteenth and seventeenth centuries.[38] The Dutch had discovered the East Indies and were met by Portuguese claims. The Portuguese and later the Spanish (between 1580 - 1640, when the Crowns of both Spain and Portugal were united under King Philip II of Spain) challenged the right of the Dutch to trade in that part of the world, which claim was based on papal donation or prior discovery. Actually this dispute resulted in one of the most celebrated works in international legal history - *Mare*

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[35] (cont'd) ..... *[l]e roi de France, Francois Ie demanda á voir le testament d'Adam qui le dépouillait du droit d'acequérir des territoires dans le Nouveau Monde. op. cit.* Tome I. p. 687.

[36] See his first Relectio , On the Indians..., where he insists that the Pope has no temporal powers over the Barbarians. See text in De Indis et de Jure Belli Relectiones. (1557) Transl. of text of 1696 by J.P. Bates. Sec. II, 1-6., See pp. 129-137 of 1964 Reprint by Oceana Publication. Walker, *op. cit.* pp. 216-219.

[37] Fulton, op.cit. pp. 58, 75, 87.

[38] According to Fulton, the practice whereby England required ships in her seas to drop their top sails and hand down their flags was considered a matter of 'honour' and respect and did not signify any pretensions to ownership or sovereignty. Fulton *op. cit.* pp. 9,118.

Liberum by Hugo Grotius.[39] The Dutch were at the same time grappling with problems of fisheries along the Irish and English coasts. Since fisheries had become a prime resource for England, King James I, viewing the flourishing of Dutch fisheries as a threat to that of his subjects, undertook a strict fishery policy.[40] Besides if England was to become rich and powerful, she had to gain supremacy in shipping and maritime commerce. The stepping stone to achieving this was through securing her fisheries by imposing tithes on foreign fisheries with a view to restricting them and expanding her own. However, the imposition of the assize-herring[41] on the huge fleet of Dutch fisheries was not easy. Inevitably, the long negotiations and conferences following the fishery disputes culminated in the three Dutch wars.[42]

Maritime pretensions were not only restricted to English claims, Sovereigns all over Europe sought to defend their various claims of expanding territorial sovereignty overseas. They sought the help of civilian writers and jurists to defend these claims giving rise to the 'Battle of the Books'. Besides, the great political thoughts of this era enhanced the works of the various classicists who used their pens to defend their sovereigns' pretensions. It is also interesting to note that they all invariably relied on the works of early theologians, historians, geographers and even on mythology, but arrived at divergent conclusions on the same issue. From a purely juristic perspective therefore, the value of most of these works lies not only in the legal theories propounded but in their analytical structure. It is also interesting to note that all those involved in the 'Battle of the Books' concerning either the freedom or the sovereignty of the oceans, argued also from motives which are at worst chauvinistic or at best purely subjective.[43]

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[39] See *infra*. pp. 21-24.
[40] Fulton, *op. cit*. pp. 124-134.
[41] This was an ancient custom whereby each fishing boat in the herring industry was taxed a thousand herrings as part of Crown revenue, later commuted to money payments for convenience.
[42] It is not relevant to give a detailed account here. See Fulton, *op. cit*. pp. 388-534.

C. MARE LIBERUM, MARE CLAUSUM, A BATTLE OF BOOKS.

The juridical status of the sea, before the Battle of Books can be traced to Justinian's Institutes. As has been mentioned, although maritime practices had been codified in various scrolls dating back to ancient times, it was probably during Justinian's era that the sea was accorded to definite juridical status in terms of Roman Law concepts. Thus to him is attributed the first attempt to legally define the seas.[44] In his Institutes[45] he describes the sea as " *res communis*", and thereby distinguishes between "*res publicae*" and "*res communis*". The former applied to harbours and ports, which were regarded as public property, belonging to the state. *Res communis* however signified what was not susceptible to ownership, neither public nor private, but the use whereof was common to all men. Thus in respect of *res communis* like the air and the sea, the use of which by the law of nature was common to all men, it could not be the subject of private ownership. However, the particular people whose territory is adjacent to the shore must see to it that this free and universal usage is not impaired by the acts of individuals, although anyone may put buildings there.[46]

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[43] Selden for example was instructed to reply to Grotius by Order in Council, but would have probably written this anyway for political reasons. See note 78 infra. While exiled in France, Grotius refused to answer most of his critics notably Seraphim de Freitas. See W.S.M. Knight, The Life and Works of Hugo Grotius. (1925) Sweet and Maxwell. p. 110; E. Dumbauld, The Life and Legal Writings of Hugo Grotius. (1969) Norman; University of Oklahoma Press. pp. 7, 23-29.

[44] P.T. Fenn, Note 33 *supra*.

[45] Gai, ii. 1; Inst. Lib II, tit. 1. "*Quaedam enim naturali jure communia sunt omnium, quaedam publica, quaedam*

By the sixteenth and seventeenth centuries, the prevalent doctrines concerning the juridical status of the sea could be articulated in such concepts as *res communis*, *dominium*, *imperium*, all of which have their origins in Roman and Canon Law. These concepts were later to be refined and articulated by the intellectualism which characterised this era, culminating in the two doctrinal bases for the modern international law of the sea, namely, *mare liberum* and *mare clausum*. Although discussion of these doctrines give a lot of credit to Grotius as being the originator, this is not

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[45](cont'd) *universitatis quaedam nullis, ... Et quidem naturali jure communia sunt omnium haec; aer et aqua profluens et mare et per hoc la litoria maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis, et aedificiis - abstineat, quia non sunt juris gentium, sicut et mare.*"

[46]*Ibid*, Lib. II, I,5. This special jurisdiction does not signify ownership but merely a form of guardianship. In the words of Celsus, *Litora in quae populus Romanus imperium habet populi Romani esse arbitror*. Digest, 43.8.3.

quite fair to some of his predcessors upon whose works he greatly relied.

Notable among these was the great Spanish theologian, Franciscus de Vitoria, prima professor of the University of Salamanca and the founder of the Spanish School who is often described as the greatest of all the theological writers of the sixteenth and seventeenth centuries.[47] His writings were quite remarkable at the time, particularly in his courageous defence of the rights of Indians in the New World, but more importantly, his conception of an international community as coexistence of states in comity without reference to geography, race or religion, which is still very much at the core of contemporary international jurisprudence. For the present purposes however, it is his work 'On the Indians' which is significant. This is because, subsequent writers on the law of the sea quoted extensively from his views on discovery and sovereignty.[48] In this he asserts that the Pope, not being the civil or temporal lord of the whole world, has no such power over the Indian aborigines in the New World, consequently, the latter's refusal to recognise his overlordship furnishes no ground for waging war on them.[49] He stated however that the Spaniards have a right to travel in the lands of the Indians and sojourn there, and so long as they do no harm, they cannot be deprived of this right. They could actually claim this right by force of arms if it is denied.[50]

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[47] Brierly, *op. cit.* p.26

[48] For example, Grotius in his Mare Liberum and Gentilis in De Jure Belli, Libri Tres infra. note 53.

[49] De Indis ... note 36 *supra*. sec. II, 1, 3, 6,7.

Another forerunner of Grotius was Albericus Gentilis, an Italian who adopted England as his motherland.[51] In one of his major works, *'De Jure Belli'*,[52] in his discussion of the causes of war, he asserts that according to the law of nature, the sea is the common property of all, and as such condemns pirates and brigands whose acts cannot constitute legitimate acts of war. He also rejects the claim of the Venetians over the Adriatic, as being a violation of the law of nature:

> "For if the sea has been open to all by nature, it ought to be closed to no-one. To close it is usurpation, and usurpation is an unlawful act. The Venetians possess jurisdiction and a protectorate over that part of the sea as others do over their parts of it..."[53]

. For him, it is important to exercise some jurisdiction even over the deep seas, in order to punish crimes, and such magistracy belongs to the law of nations. He thus makes a distinction between *'dominium'* and *'iurisdictio'* according to Roman law principles. This is probably the first scientific synthesis of maritime dominion later to be accepted as the solution to most jurisdictional problems. He applied these views in a subsequent plea in the English Court of Admiralty regarding the protection of sea-territory, as an advocate for the Spanish Embassy in London.[54]

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[50] *ibid*. Sec. III, 2.
[51] For his role in the development of international law, See G.H.J. Van Den Molen, Alberico Gentilis and the Development of International Law. (1968 2nd Rev. Edn.) Sijthoff-Leyden.
[52] A. Gentilis, De Jure Belli, Libri Tres (1612). [Transl. J.C. Rolfe, 1933] Classics of International Law. Oceana Reprint of 1964.
[53] *ibid*. Bk. I, C. 19, pp. 91-2.

In this particular matter, the Dutch who were at war with the Spanish had seized an enemy vessel on the high seas, and had been intercepted by His Majesty's Officers who took them and the booty to an English harbour. In rejecting a claim by the Dutch for compensation for wrongful interception, Gentilis maintained and insisted on the right of the King to punish crimes even out on the high seas. Besides, the doctrine of 'postliminium'[55] and the 'recently concluded peace treaty between Britain and Spain' justified the King's officers in suppressing unjust violence by 'an unscrupulous belligerent,' whose act was in effect piracy.[56] In referring to his earlier work,[57] he supports his views that those acts were piracy because the captors had not complied with the customs of warfare, by waging war against non-combatants and harmless merchants.

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[54] See his, Hispanicae Advocationis, Libri Duo (1613) [Transl. of 1661 Text by F.A. Abbott, 1921] Carnegie Classics. p. 35.

[55] This has its origins in Roman Law principles on property. See Justinian Institutes. Note 45 *supra*. Lib. I, 12,5. It is a fictional doctrine which permits the re-instatement or restoration retroactively of the status of rights of a person who has been absent from his country of origin as a result of capture during war, rights which would otherwise have been suspended by reason of his having lost the status of a free man. In International law, this is applied also to the recapture of property taken by an enemy.

[56] Gentilis, Hisp. Adv. *supra*. pp. 35-38.

[57] Gentilis, De Jure Belli Supra pp. 21, 22.

It was Hugo Grotius however, who clearly articulated these emerging notions concerning the juridical status of the sea. The anonymous publication in 1608 of *Mare Liberum*[58] marked the height of intellectualism and erudition which characterised the post-middle ages era. The importance of this work, for the present purpose, lies in the factors which necessitated its publication. *'Mare Liberum'* served primarily as a legal defence for Dutch commercial and maritime interests in the Indies. Mainly concerned with the freedom of navigation as a precondition for freedom of commerce, the freedom of the seas for him is a means to an end, an economic end, commerce and trade. He however discusses such mundane issues as fisheries and territorial protection, but not to any great extent.[59] Generally arguing on principles of natural law and quoting extensively from historians, theologians, and jurisconsults, he presents a very rigorous and persuasive defence for the freedom the seas as well as commerce or trade. He argues that, that which cannot be occupied or which has never been occupied cannot be the property of anyone, since all property arises from occupation. Besides that which has been so constituted by nature that, although serving some one person, still serves for the use of all others, ought in perpetuity to remain in the same condition as when it was first created by nature. Consequently, the sea, being so limitless that it cannot be possessed by any one person, must remain common and be adapted for the use of all as regards both navigation and fishing.[60] But even Grotius had to contend with the realities of the existence of pockets of 'occupied' seas such as the chank fisheries off Parkis Bay of Ceylon and the coastal sponges of the Adriatic and the Ligurian Seas. Thus he limits his *'Mare liberum'* to the "open" seas and maintains at the same time that the jurisdiction which the Romans exercised over various parts of the sea was not by any private rights of proprietorship, but by the common rights which all other free people enjoy.[61] He is therefore able to reconcile the actual practice with his theoretical analysis. He however makes a not-so-clear distinction between the 'outer sea' and the 'inner sea'. The latter, normally surrounded on all sides by land, and gulfs and straits is capable of appropriation like rivers and lakes.

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[58] The full title is "The Freedom of the Seas of the Right which belongs to the Dutch to take part in the East Indian Trade. This originally formed part of a legal opinion, De Jure Praedae which was not published until 1868.

[59] The view has been put forward that *Mare Liberum* was published as a direct challenge to British policy of restricting fishing rights in her coastal waters. See for example G. Gidel, Le Droit International Public de la Mer. (1932). Tome I. p. 142. Apparently Welwood's reply in 1613 seems to support this view. See Fulton, *op. cit*. pp. 346-7. See also J. Boroughs, note 34 *supra*. pp. 41-43, where he states specifically that it was written at the request of a Great Person to Affirm "that Princes may have an exclusive property in the sovereignty of all the several parts of the sea, "contrary to what" some of late have endeavoured by way of argument to prove." However, the sub-title of *Mare Liberum* gives a clear indication of the purpose for which it was written, although in the process, it served a dual one.

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[60] H. Grotius, Freedom of the Seas. (1608) Magoffin transl. of text of 1633. Oxford University Press. pp. 22-32.

[61] *Ibid*. p. 35. But See E. de Vattel Le Droit des Gens, (1758) Transl. by Fenwick, Carnegie Classics. Bk. I, c. 23. secs. 279-295, pp. 106-110; who maintains that a maritime people may appropriate and convert to their own profit 'an advantage' which nature has given them, thus "who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" This is in fact a proposition which Grotius later admits in his *magnum opus*, "De Jure Belli ac Pacis, Libri Tres." (1625)[Trans. of text by Kelsey, Carnegie Classics 1925] Oceana Reprint, 1964. Bk.II, C.III, sec. 7-13. pp. 209-214.

It is interesting to note that Welwood also admitted that his concept of *mare clausum* did not apply to that part of the "maine sea or great Ocean, which is far removed from the just and due bounds ... properly pertaining to the nearest lands of every Nation."[62] Basically, Grotius argues for a complete freedom of the high seas for innocent uses and particularly in the interest of his countrymen. Probably the lofty moral ideals presented in his arguments as counsel for the East India Company gave *Mare Liberum*, which constituted but a fraction of the larger brief, De Jure Praedae most of its charm and reputation. It is thus not surprising that it was and still is often referred to in diplomatic negotiations and other controversial issues regarding the freedom or sovereignty of the seas.[63]

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[62] Welwood, note 10 *Supra*. p. 72. See also dissenting opinion of McNair in Anglo-Norwegian Fisheries Case (Britain vs. Norway) [1951] ICJ Report 116, at 160, where he states that 'every coastal state has territorial waters, possession of which is not optional but compulsory.'

[63] See Fulton, *op. cit*. p. 345, G.N. Clark. "Grotius East India Mission to England." (1934) 20 Grotius Society Trans. p. 45 esp. at 72-83, where he was faced with a quotation from his own work regarding Dutch claims to trade monopoly in certain islands in the Malay Archipelago. See also, Introduction to Freedom of the Seas, note 60 *supra* where James Brown Scott states that the pressures of the world war has made it necessary and important to publish, "the famous Latin tractate of Grotius proclaiming, explaining and in no small measure making the freedom of the seas," because as he observes, all nations being equal, they all have a right to the uninterrupted use of the "unappropriated" parts of the ocean for their navigation. This was before the United States came into World War I and was still proclaiming the absolute right of neutrals at sea.

In *De Jure Belli Ac Pacis*,[64] he amplifies and modifies his reasoning in the earlier work and reiterates that the vast expanse and inexhaustibility of the sea, and its fluidity make it impossible of possession and appropriation[65] He admits, however, that just as rivers and lakes may by reason of their banks be appropriated, certain parts of the sea could be made subject to the jurisdiction and sovereignty of a state, and that sovereignty could be acquired in the same way as sovereignty is acquired over land. Thus, even in the absence of treaty rights or a common understanding, a portion of the sea can in some manner be subject to ownership.

It has however long been proven that inexhaustibility of the resources, as a criterion for abs~~olute freedom~~ is no longer tenable.[66] Besides, various parts and depths of the seas can now be occupied and explored,, and natural and divine law have been almost totally displaced by strong legal positivism and realism. Thus, the contemporary doctrine for freedom of the seas has been greatly diluted, evidenced by various concepts like territorial sea, continental shelf and in the past decade especially, the exclusive economic zone. However, the last vestiges of this old doctrine - *mare liberum* - may be seen in the concept of the common heritage of mankind.[67]

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[64] Grotius, note 61 *supra*.
[65] *Ibid*. Bk. II, C II, Sec. 3, p. 190.
[66] W.F. Newton. "Inexhaustibility as a Law of the Sea Determinant." (1981) 16. *Texas Inter'l L.J.*. pp. 369-432.
[67] This concept asserts the principle of non-appropriation of the ocean floor beyond national jurisdiction by individual

It must be noted that the anonymous publication of *Mare Liberum* did not pass unanswered, nor was the doctrine espoused therein readily accepted. In fact, the crisis between the Dutch and the Spaniards was settled by treaty, but this settlement did not quell the intellectual fire which had been ignited throughout Europe. From the Spanish quarter, the reply to Grotius, which did not become so popular, was in the form of a rather lengthy and elaborate defence of Portuguese rights in the East Indies, a juridico-historical work by the Portuguese monk, Seraphim de Freitas.[68] His work[69] was aimed as much at justifying Portuguese claims as replying to Grotius' *Mare Liberum*. Freitas refutes the Grotian assertion that the right to free trade and navigation is an overriding principle in the law of nations. According to him, this right is a prerogative of the sovereign and in common with other Spanish writers like Vitoria and Suarez, he emphasizes, as a paramount rule in the law of nations, the propagation of the Christian faith in pagan lands.[70] He does, however, agree in principle with Grotius that the sea is *res communis*, but he lays emphasis on quasi-possession and the right of protection and

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[67] (cont'd) states and advocates the use of that area for the benefit of all mankind regardless of the extent of national development, so that the fruits of such exploitation belongs to all and are open to all.

[68] The unpopularity of this work has been attributed to the subsequent course of western civilization. See Knight, W.S.M. "Seraphim dee Freitas; critic of Mare Liberum" (1925). Vol.II Grotius Society Trans., pp. 1-9.

[69] De Justo Imperio Lusitanorum Asiatico, published in 1625 in Valladolid.

[70] See Alexandrowicz, C.H. *op. cit.* note 18. pp. 41-67.

jurisdiction which a sovereign can exercise over parts of the sea.[71] This, he insists the Portuguese had firmly established in the East Indies with the introduction of cartazes and safe conducts. However, there is no need to go into a detailed discussion of his work here, for it appears that Freitas and Grotius did not differ on the legal status of the sea as *res communis*. Thus, there is probably a justification for Knight's remark that:

> the general impression that is left upon the reader of these two works...is that apart from the political interests...there is very little if anything, to choose between the respective merits, juridical or otherwise of the two contestants. Each side was playing for its own hand, entirely different on all occasions of critical emergency, to considerations of pure or abstract right.[72]

It is however from the English quarter[73] that the real opposition to *Mare Liberum* emerged. Barely half a decade after its publication, Welwod, the renowned Scottish lawyer came out with his Abridgement of all Sea-Lawes.[74] His main concern was with fisheries which he maintained could be exhausted as the

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[71] *Ibid*. See also Alexandrowicz, C.H. "Freitas versus Grotius" (1959), Vol. 35. BYBIL. pp. 162-182.

[72] Knight, note 69 *supra*. pp. 8-9. See also, P.B. Potter, The Freedom of the Seas in History, Law and Politics. (1924) p. 61.

[73] There were other works on the subject, all of which cannot be discussed here. See Fulton, op. cit. pp. 338-377 for a detailed account.

[74] See notes 9 and 10 *supra*.

> daily experience these twenty years past and more, hath declared to be over time: for whereas aforetime, the white fishes daily abounded even into all the shoares on the Easterne coast of Scotland; now forsooth by the neere and daily approaching of the busse fishers the sholes of fishes are broken and so farre scattered away from our shores and coasts, that no fish now can be found worthy of any paines and travels; to the impoverishing of all the sort of our homefishers, and to the great damage of all the nations.[75]

By way of conclusion, he asserts that the prohibition of promiscuous fishing was a legitimate restriction on the freedom of navigation, which applied only to the open seas.[76] Two years later he published a much superior work, De Domino Maris, in which he refined and amplified his earlier stance.[77]

By far the strongest opposition to *Mare Liberum* from the English camp came from Selden whose work set out the theoretical, practical and legal aspects of the dominion of the seas.[78] This work appeared at a time when broad pretensions to the dominion of the sea were being made by the British Crown and its naval supremacy around the world was being vigorously challenged. But the significance of this work does not lie merely in the elaborate and masterly manner in which Selden asserted and defined British sovereignty over the seas, but also in the fact that it correctly represented, then and now, the admitted principles as to the appropriation of the adjacent seas. His main thesis here is that, by the law of nature, the sea is not common to all men, but is capable of private dominion or property in the same manner as is the land. The King of Great Britain is therefore Lord of the sea flowing about, as an inseparable and perpetual appendant of the British empire. He sets out in his first book to establish that the sea is not everywhere common, but is capable of appropriation and has in fact been appropriated. He does this by first outlining all the objections levelled against this assertion which he classifies as follows: a) the objection normally raised on the basis of the law of nature/nations, and the freedom of commerce or navigation;[79] b) the physical nature of the sea;[80] and c) the writings and testimonies of jurisconsults and other learned men.[81]

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[75] Welwood *op. cit.* pp. 61 -72 esp. at 72.
[76] *ibid*.
[77] See Fulton, *op. cit.* pp. 354-356.
[78] J. Selden, Mare Clausum: Of the Dominion or Ownership of the Sea. (1652) Nedham Transl. Reprint. 1972: Arno Press, New York. This work and the manner in which it was presented is said to have been largely motivated by an urgent need in Selden to settle his political debt or buy his way out of trouble. He had been very vocal in Parliament's resistance to the King in 1629, had been imprisoned as a result and consequently released on a strict bond of good behaviour. However, he was actually directed to reply to the "Dutch

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[78] (cont'd) upstart." See note 43 *supra*. In any case, whatever may have been the reasons for writing, this work portrays the immense erudition and ingenuity of reasoning which its author possessed. See Fulton, *op. cit* pp. 366-67.

[79] Selden, *op. cit*. pp. 3-4, 42-46.

[80] *Ibid*. pp. 3-4, 127-145.

[81] *Ibid*. pp. 3-5, 145-179.

First he argues that dominion or proprietorship of the sea is in fact compatible with the law of nature or nations, as the practice of the more civilised and more noble nations, both ancient and modern had shown.[82]

To the second objection, he replies that every ocean has shores or islands by which it may be measured, besides nautical sciences have greatly facilitated measurement and locations on the sea.[83]

Further, the seas are exhaustible and the resources of the sea can be exhausted by common and promiscuous use, such as overpearling or overfishing.[84] He, however, seems to agree in principle with Grotius that freedom of all harmless navigation and commerce cannot be denied, but this is a perogative of the Sovereign who owns the sea or land. Thus, allowing innocent passage in no way derogates from the dominion of the prince who of course always reserves the right to refuse admission to strangers where the common weal may thereby be damaged. He also opposed the Portuguese and Spanish claims because, as far as he was concerned, these were based on illegitimate title and were therefore illegal.

However, from the latter part of the seventeenth century onward, writers seem to have struck a balance between this legal stalemate to arrive at a more acceptable doctrine regarding the juridical status of the sea. It is in this regard that the following works are discussed.

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[82] *Ibid* pp.27 -46.
[83] *Ibid*. pp. 27-46.
[84] *Ibid*.pp. 140-145. See also, Newton, note 66 *supra*.

Pufendorf in his De Jure Naturae et Gentium touches on this issue when discussing Dominion.[85] He states that by the law of nature, the sea can be subject to dominion and tackles the objections relating to the physical nature of the sea and its inexhaustibility. He argues that there are some uses of the sea which are inexhaustible, such as the use of the sea for drawing water and bathing, as well as navigation, whereas fishing and pearling clearly are exhaustible. In the latter instance, "nothing prevents the people dwelling along that shore or neighbouring sea from being able to lay a stronger claim to its felicity than those who dwell at a distance..." Thus, the Ceylon fisheries were properly subject to ownership as were the sponge fisheries of the Bay of Tunis.[86] One sees in his analysis, the seeds of a growing concept, that of the territorial sovereignty and/or a fisheries jurisdiction.

The arguments of Bynkershoek[87] more concretely reflected the ideological change which characterised the writings of this period, although his wider theory of ownership of the 'open seas' was largely rejected. In his first work, what has been described as "the first fruits of a sturdy stock,"[88] he asserts that the vast oceans, as well as the waters which wash the shores of a littoral state can be appropriated and made subject to dominion, through effective occupation. Since such occupation must be effective, it must be properly defended and maintained. On the open seas, he does not conceive of any such occupation, and that is the only reason for it not having been appropriated. However, the possession of a maritime belt can extend as far as it can be held in subjection from the mainland,

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[85] S. Pufendorf, De Jure Naturae et Gentium Libri Octo. (1688) Transl. by Oldfather & Oldfather. Carnegie Classics. (1934), Bk IV, C. V, pp. 558 *et seq.*.
[86] *ibid*. p.562, See also Colombos,*op. cit*. pp. 159-162, Gidel, *op. cit*. Vol.I pp. 491-493.
[87] He was the Dutch writer who propounded the cannon-shot rule. See W.L. Walker, "Territorial Waters: The Cannon-Shot Rule." (1945) 22 BYBIL 210-231.
[88] C. Van Bynkershoek, De Domino Maris Dissertatio. (1744) Magoffin transl. Carnegie Classics. See Introduction by

> for in that way...the possession...is properly defended and maintained. The precise distance from land that dominion over a maritime belt may seem to extend is a hard question to answer, but the power of land properly ends where the force of arms ends, therefore the sea can be considered subject as far as the range of cannon extends, for that is as far as we can seem to have both command and possession.[89]

Thus, from the seventeenth century onwards, the notion that a coastal state had territorial sovereignty as well as proprietary rights in a certain portion of the oceans adjacent to its land territory was becoming an accepted legal norm. Although the world was anxious to secure the right of navigation, it was nevertheless willing that states should enjoy the minor rights of property, and the general

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[88] (cont'd) James Brown Scott, p. 17.

[89] *Ibid.* pp. 43, 44. Walker suggests that this was already a matter of state practice. See Walker, *op. cit.* p. 211.

rights of sovereignty which accompany verbal claims to ownership.[90]

D. DEVELOPMENTS FROM THE EIGHTEENTH CENTURY TO 1945

This period has been chosen to illustrate the dialetical evolution of the legal concepts with which the 1958 Conference of the United Nations on the Law of the Sea had to deal. The creation of the United Nations itself, and the aftermath of the second world war were two important historical phenomena which changed the approach to discussions on the law of the sea. Nations had realized that, far from asserting individual and divergent claims to ocean space, some sort of an agreement had to be reached with regards to the rights and duties exercisable thereon. During this period, it was the status of the territorial sea or waters which had to be contended with, a concept which strikes a balance between *mare liberum* on the one hand, and *mare clausum* on the other. It became important basically because it was considered important and vital for the security of the state that it should have exclusive possession of the sea off its shores in order to protect it, as well as supervising all ships entering, leaving or anchoring there, in furtherance of its commercial, fiscal and political interest. Thus, by the mid-nineteenth century, England had consolidated all of her "hovering acts" into the "Customs Consolidation Act" (1876) and as Lord Stowell stated in the case of Le Louis:

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[90] H. Wheaton, Elements of International Law (1836). Classics of International Law. p.286. Hall, *op. cit*. p. 121, G.F. de Martens, Précis de Droit Des Gens Moderne de L'Europe. (1831) Paris Tome I. p. 124. The Dutch were fined 30,000 pounds by the English in 1636 for failing to obtain licences as required by the Proclamation of 1609 and 1639 for the Restraint of Fishing Upon His Majesty's Seas and Coasts. In Venice and Genoa, these claims to maritime sovereignty had been firmly established. See also decision of Lord Stowell in The Twee Gebroeders. (1800) ER 485, 490-1.

> maritime states are allowed by common courtesy of nations, for their convenience, to consider those parts of the oceans adjoining to their shores as part of the dominion's for various domestic purposes and particularly for fiscal and defensive regulations more immediately affecting their safety and welfare.[91]

Although such jurisdiction accorded to the littoral by common courtesy was limited,[92] concerns about public safety and welfare as well as fisheries conservation, made it almost imperative.[93]

Having thus established two basic concepts regarding maritime jurisdiction, one of territorial sea, and the other of international freedom of the outer seas, the controversy which pervaded the legal arena was one regarding the status of the territorial sea, its extent, and the rights and duties exercisable therein. At the turn of the nineteenth century, the first attempt was made by the Institute of International Law[94] in 1874 to resolve the issue. It did this by way of a quasi-codification of the geographical limits of maritime laws, specifically noting that the three-mile limit was insufficient for the protection of coastwise fishing, and did not correspond to the actual range of guns on the coast. A territorial sea limit of six marine miles was thus proposed, and the right of sovereignty of the littoral therein was subject only to that of innocent passage for all vessels.[95]

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[91] [1817] 2 Dods. 210; 165 ER. 1464. at. 1476.

[92] See for ex., decision in R v Keyn (1876) LR.2.Ex.D. 63.

[93] P.C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927) G.A. Jennings and Co., New York, pp. 75-77, 91-100.

[94] More commonly known as Institut de Droit International,

Judicial opinions were equally vague as regards the actual extent of the territorial sea.[96] While there was some doubt as to the extent of ordinary criminal jurisdiction[97] the need to protect and preserve traditional fishery rights was generally emphasized. Thus, by the twentieth century,

> when the great duel between *mare liberum* and *mare clausum* (had) ended,...[t]he sea became, in general, as free internationally as it was under Roman law. But the new principle of freedom, when it approached the shore met with another principle, the principle of protection; not a residuum of the old claim, but

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[94](cont'd) whose membership comprises distinguished and eminent international jurists.

[95]Text reproduced in P.C. Jessup, op. cit. pp.444-483. See also a discussion of this in D.P. O'Connell, The International Law of the Sea (1982). Clarendon Press: Oxford. Vol. I. pp. 20, 67, 68, for 54, 524-527. See also, Fulton, op. cit. Appendix O. p. 774.

[96]For example in the Behring Sea Fur Seal Arbitration (1893) Vol. I, Moore's Arbitrations, p. 755, the arbitrators being of the view that they were not called upon to decide what were the ordinary limits of territorial waters, rejected the United States claim to extend jurisdiction beyond the three-mile distance on the basis of the Anglo-Russian Treaty of 1825. See also, The Costa Rica Packet. (1897) Vol. 5, *Ibid*. 4952. between Great Britain and the Netherlands.

[97] See R v Keyn, note 92.*supra*.

> a new independent basis and reasons for modification near the shore of the principle of freedom.[98]

Thus all attempts at codification during this period were based on this principle. The International Law Association in 1926, for example, adopted a draft convention on maritime jurisdiction, article 2 of which states that a coastal state shall exercise territorial jurisdiction over a sea belt of three marine miles from its coast, in order to maintain its integrity and good government.[99] The operative words here are "maintenance of territorial soverignty and good government." Article one generally reiterates the absolute liberty and equality of all states in respect of navigation, transportation, commerce, industry and science in and on the seas in order to serve the fullest use of the seas.[100]

The Institute of International Law discussed the subject at both its Hague and Stockholm conferences in 1925 and 1928 respectively. Adopting a flexible limit of a three-marine mile territorial sea in 1928,[101] the Conference emphasized the right of a state to take all necessary measures for ensuring its security, sanitary and customs policy as well as fisheries protection in a supplmentary zone not exceeding three miles from the territorial sea.[102]

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[98] Statement of Elihu Root on behalf of the United States in North Atlantic Fisheries Arbitration. (1910) Proceedings, Vol. XI., p. 1927 at 2006.

[99] 34th Report. International Law Conference. p. 40, 101-4.

[100] *Ibid.*

[101] (1928) 34. Annuaire de l'Institut de Droit International. pp. 755-760.

[102] *Ibid.* See also Harvard Law School Draft Convention, (1929) 23 AJIL (Spec. Supplt.) p. 249. Colombos, *op.cit* pp. 88-92, O'Connell, *op.cit.* pp.20-22.

This is in principle not different from the nineteenth century status quo, and the Institute's own views of a six-mile territorial sea limit in 1894. The rationale behind the hovering legislations has been preserved and a new dimensioon has been added, namely the protection of fisheries.

The most significant codification, however, was the 1930 Hague Codification Conference convened under the auspices of the League of Nations. The Law of Territorial Waters was the second subject considered ripe for codification.[103] However, the extent of the territorial sea, the most troubled issue then, could not be resolved at this conference. This failure can appropriately be attributed to political and economic tensions. The great maritime powers jealously guarded the principle of the freedom of the seas, but the majority of states insisted on the dangers of overfishing and the need of legal controls in the form of extended maritime limits for fisheries jurisdiction.[104] The numerous and diverse interests and opinions only served to compound the controversy concerning the breadth of the territorial sea, which remains contentious today. The conclusion of the 1982 Convention on the law of the sea, does not impose a mandatory extent, but only stipulates a maximum limit of twelve miles.[105]

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[103] The two other topics being nationality and state responsibility. See S. Rosenne, Conference for the Codification of International Law. [1930] Vol. II. p. 219.

[104] *Ibid*. Vol. IV, 1203. See also M.O. Hudson, "The First Conference for the Codification of International Law." (1930) AJIL 514. Reeves "The Codification of the Law of Territorial Waters." *Ibid*. 486. See also Colombos, loc. cit., O'Connell, loc. cit.

E. DEVELOPMENT SINCE 1945

Although the Hague Conference did not codify the law of the sea, it set important parameters for future discussions of ocean issues which increased after the Second World War, particularly with the discovery of important ocean resources beneath the high seas. By the middle of this century, with a proliferation of practical problems in regard to ocean issues, the law of the sea once again became of prime concern to the international community. There emerged other matters requiring urgent attention apart from the law of territorial waters. The drilling of oil beneath the oceans made possible by advanced technology, the discovery of other valuable mineral resources on the seabed, coupled with state practice all contributed to a change in law of the sea conceptions.

In this regard, the Truman Proclamation of 1945[106] is probably the most appropriate turning point since it is the clearest modern articulation of one of the basic principles of the law of the sea - the continental shelf doctrine. By this proclamation, the United States claimed jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf, which "may be regarded as an extension of the landmass of the coastal nation and thus naturally appurtenant to it."[107] Truman also issued another proclamation, not so significant, concerning fisheries, whereby the United States asserted the right to establish fishery conservation zones, subject only to historic rights, in the high seas. Although the American Proclamation is the most popular, the two decades after the Second World War marked a series of pretensions to the continental shelf, especially from Latin America, such as the Decree of 24 January 1944, of Argentina and the 23 June 1947, Presidential Declaration of Chile.[108]

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[105] Article 4 of Convention. Vol. 21 ILM. 1261. Modern authorities agree that the three-mile limit is the minimum, if not altogether obsolete, but they do not seem to agree on the maximum limit for the customary rule. Thus, for states not parties or signatories to the convention, the customary law rule is largely a matter of conjecture based on a *laissez-faire* attitude whereby claims and counter claims eventually resolve the issue. Signatories to the Convention have an obligation under international law not to do anything to jeopardize the eventual implementation of the provisions of the Convention. They can therefore only claim up to twelve marine miles. The United States sticks to the three mile limit, although in 1979 she appeared ready to accept twelve miles. See *Digest of United States Practice*, 1979, p. 997-8.

[106] (1946) *AJIL* (Spec. Supplt.) p. 45. The doctrine, however, as proclaimed by President Truman was not wholly a novelty. It had been used as early as 1897 by a geographer. See, L.C.

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[106](cont'd) Green, "The Continental Shelf." (1951) 4 CLP 54 at 57., M.W. Mouton, The Continental Shelf. (1954) Hague Recueil, O'Connell, *op. cit.*. pp. 467-75. Although not clearly articulated, it seems to have been the basis of a Ceylonese Ordinance in 1925 on Pearl Fisheries, as well as the Gulf of Paria Agreement between Great Britain and Venezuela in 1942.

[107] The 1958 Convention on the Continental Shelf gave the coastal state sovereign rights over "the seabed and sub-soil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of two hundred meters or beyond that limit, to where the depth of the superjacent waters admits of exploitation of the natural resources of the said area." See 499 UNTS 311. Article 76 of the 1982 Convention basically gives the same definition, except that it removes the exploitability criterion and imposes a limit of two hundred miles seawards. See chapter five infra.

[108] See B. Auguste, The Continental Shelf. (1960) Genéve, Librairie E. Droz. for a detailed exposition of these

Thus, long before most African nations emerged on the international scene, there had already been significant inroads in the concept of freedom of the seas which had since the eighteenth century been the legal norm regarding the international law of the sea. By the time the First United Nations Conference on the Law of the Sea was convened in 1958, seven African States[109] were able to participate in the process of international law-making. This conference was not merely a codification conference but also had a mandate to develop the law, in view of the technical and economic development of the decade. Participation by African states at this conference was very minimal in positive contribution as well as numerically. This was largely because discussion at the Conference was based substantially on the draft articles prepared by the International Law Commission which at that time had no African member.[110] Four Conventions were agreed upon at this Conference[111] emphasizing the freedom of the seas, but at the same time sanctioning considerable

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[108](cont'd) claims, esp. at. pp. 13-24, 105-203.

[109] These were Egypt, Ghana, Liberia, Libya, Morocco, Sudan and Tunisia.

[110] It was not until 1958 that the first African member was admitted to the Commission. Now it has eight African members out of thirty-four.

[111] Conventions on: The High Seas, 450 UNTS 11, ND I, 257; The Territorial Sea and Continguous Zone. 576 UNTS 205, ND I, p. 1; The Continental Shelf 499 UNTS 311, ND I, p. 101; Fishing and Conservation of the Living Resources of the High Seas, 559 UNTS 285, ND I, p. 353. There was an optional protocol concerning the settlement of Disputes. 450 UNTS, 169. Appendix I shows African states who are parties to these conventions. To a large extent, these conventions can be regarded as customary international law, especially that of the Continental Shelf, even for those who are not parties.

extensions of national jurisdiction, especially under the continental shelf doctrine.

When the second conference was convened in 1960, many African states were still struggling for their independence and political self-determination. After 1960 however, there was a profound transformation of international relations, largely as a result of the emergence of new states in Africa, Asia and the Carribean. As was to be expected, or in fact predicted, these new states not only changed the political and economic equilibrium of the international community, but made new demands on international law as well. They also largely rejected most of the principles of the international law of the sea as being inapplicable to nonwestern countries because of their eurocentricity,[112] an issue which has been highly debated in international circles.[113].

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[112] Jean-Claude Douence, "Droit de la mer et développement, économique sur la côte occidentale d'Afrique." (1967) 38 RGDIP. 110-142, R.A. Falk, "New States and the International Order". (1966). 118 Recueil des Cours. 1-102 esp. at 28-43. See also Brierly, *op. cit*. p. 42.

[113] See A.V. Freeman, "Professor McDougal's Law and Minimum World Public Order." (1964) 58 AJIL. 712. Some extremists go to the point of denying the possibility of any community of values and ideas between western European countries and the Asian and African countries. See A. Bozeman, The Future of Law in a Multicultural World. (1971) Princeton Univ. Press. at p. 102, where she states that by western standards, 'law' is unknown in African culture. It is not intended here to discuss the relative merits of such western attitudes concerning African culture and law. Suffice it to reply by quoting Humpty-Dumpty's famous words to Alice, "When I use a word...it means just what I choose it to mean - neither more nor less. From Lewis Carroll's Through the Looking Glass. See also, L.C. Green, Law and Society (1975) Sijthoff-Leyden. Chpt. 5, pp. 183-240, where he draws attention to dangers of extremism both from the old and new states with regard to acceptance by the latter of customary

African states after independence made a collected effort to make their voices heard on the international scene and, their active participation in various conferences and international organizations is evidence of this.[114].

However, the attitude of African states towards the law of the sea is not based purely on its eurocentricity. Their historical background as well as post-independence preoccupation with national reconstruction makes it imperative that they should look upon international law and particularly the law of the sea as a strategy for their protection and development. This is because their economies are closely linked with those of the developed world. Basically they are exporters of raw materials, minerals and

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[113](cont'd) rules of international law, and urges that "both states and writers must recognize the fears, aspirations and suspicions of the new states...(and) concede to them the same hearing that they demand for their own views, and read the expositions of international law coming from the scholars of the developing countries with the same respect and understanding that they afford to Oppenheim and other authorities of the established order" And to scholars of the new states he rightly advises them to adapt their expositions objectively in order to merit this respect and understanding. See also his "Is There a Universal International Law Today?" 1985 Can. YBK. I.L. 3-32

[114]See generally, I. Hovet, Africa in the United Nations. (1963) Faber & Faber, London, pp. 21-72. N.S. Rembe, Africa and International Law of the Sea. (1980) Sijthoff & Noordhoff. W.W. Nyangoni, Africa in the United Nations System. (1985) Associated University Press Inc., pp. 19-21. P.S. Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference." (1979) 7 ODILA 89. Mensah-Brown, "African International Legal History." (1975) UNITAR. A remark by a European senior delegate that the African bloc has proved to be the "only entity" among developing countries, is also illustrative of African efforts at the Conference. See Berlins, "The Third United nations Conference on the Law of the Sea: Africa at Caracas." See quoted in Rembe, *op. cit*. p. 201

other agricultural produce. Thus, the prospects of seabed mining by developed countries is of major concern for them.[115]. It is in this regard that they argued that the law of the sea should be seen or based not on traditional juridical doctrines, but on an overall global effort to evolve a new and equitable International Economic Order, as well as to speed their development in accordance with the objectives of the Second United Nations Development Decade.

The actual participation of the African states at the third Law of the Sea Conference has been chronicled elsewhere.[116]. In the following chapters, an attempt is made to evaluate against the background of the historical evolution of the law of the sea described above, this African approach to the law of the sea which points largely in the direction of a global resource management scheme. African goals and objectives as presented at the conference can be realized only if the regime reflected in the convention can be wholly implemented. Great difficulties arise in the implementation of most issues in international law because of the very nature of "international law" itself.[117].

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[115] R.J. Payne, "African Economic Problems and the African Position on the Law of the Sea in Relation to Manganese Nodules." (1980) 15: 1 J. of Dev. Areas. 22 esp. at 33, 34. The importance attached by African nations to the conference and its outcome is also evident from the high level of particpation by these states at all of the sessions over a protracted period of fourteen years, despite the considerable expense involved

[116] Rembe, *op. cit*

[117] Especially the freedom of independent action by states which is regarded as a sovereign prerogative as well as the absence of or inadequacy of a proper administrative

The international law of the sea has hitherto been based on 'laissez-faire' state practice and this poses a great obstacle for the implementation of most of the provisions of the treaty.

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[117] (cont'd) machinery to enforce the law

III. CHAPTER TWO

A. THE USES OF THE SEA

The seas and oceans have always been considered great assets to mankind, and, particularly in the present century, have become the earth's largest 'single resource.' The realization of the extreme importance of this 'single resource' is a result of a multiplicity of factors ranging from the depletion of land-based resources and advances in ocean technology to the struggle by both new and old states for greater effective control over natural resources. Consequently, the seas, the use of which had hitherto been considered inexhaustible and free for all (subject only to certain restrictions),[1] is fast becoming 'exhaustible' and its use regulated for the benefit of all users.[2]

Additional needs calling for additional uses, with the advanced technology to make these new uses possible have necessitated a regime of ocean resource management at an international level. This is even more urgent with coastal states asserting increasing rights over the hydrospace, leading to a gradual but definite erosion of the traditional doctrine of the freedom of the seas. International resource management for all aspects of ocean-use has therefore become an important part of contemporary international law.[3] Thus it is quite clear that the multiplicity of uses and users in the maritime arena makes it imperative that the contemporary law of the sea be based not merely on traditional legal principles but be made to reflect modern economic realities with a view to fostering growth and eventual development for the bulk of the world's population in the underdeveloped areas. Consequently, the multiplicity of uses has necessitated a multi-dimensional approach to law of the sea issues with a view to eventually replacing the *lex lata* with the *lex ferenda*.

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[1] See Chapter One,

[2] See F.W. Newton. "Inexhaustibility as a Law of the Sea Determinant." (1981). 16 Tex. Inter'l. L.J. pp. 369-432.

[3] See L Henkin, "Changing Law for the changing Seas." in E.A. Guillion (ed.), Uses of the Seas. (1968) Prentice Hall Inc., Englewood Cliffs, N.J., pp. 69-97.

Since the African approach to these issues is the main concern of this study, it is only appropriate to discuss the uses of the oceans from the African perspective.

For most of these newly independent states grappling with diverse economic and political problems, the uses to which the oceans of the world are put are very crucial, hence their keen interest as to what decisions are made globally, and who makes them. As a continent, Africa has the largest group of landlocked states.[4] For most of the coastal states, the physical and topographical conditions are far from uniform. Thus, there are states with long coastlines and wide continental shelves like Angola, Somalia and Morocco; and those with very short coastlines, in some places less than 100 miles, like Dahomey (Benin), Togo and Zaire.[5] In spite of geographical differences, however, one bond which held all of them together at the conference was their common identity of underdevelopment and a colonial heritage. In fact they often presented a united front in submitting proposals, making this clear from the very onset.

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[4] These are Botswana, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Upper Volta (now Burkina Faso) and Zambia. See L. Alexander, R. Hodgson, "The Role of Geographically-Disadvantaged States in the Law of the Sea." (1976) 13 San Diego L. Rev. pp. 558-582. See also Z. Cervenka, (ed), Landlocked Countries of Africa. (1973). Uppsala, Sweden.

The Council of Ministers of the Organization of African Unity (OAU) in a twenty-two point declaration submitted to the Conference,[6] insisted on the need for African nations as new entrants on the international scene to "harmonize" their positions on the various law of the sea issues.

It is important, however, to note that the African states did often disagree *inter se* on certain issues[7] and this should be borne in mind when examining their positions with regard to the uses.

The following chapters discuss the shipping and navigational, extractive and economic and other uses of the sea and how each of these influenced African approach to discussions at the third conference on the Law of the Sea (UNCLOS III). In the process, the relevant provisions of the 1982 Convention on the Law of the Sea will be analysed.

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[5] Alexander & Hodgson, note 4 *supra*.
[6] U.N. Doc. A/CONF. 62/33.
[7] Particularly on the exclusive economic zone concept. See Rembe, Africa and International Law of the Sea, (1980) p.124.

B. NAVIGATIONAL USES

Navigation, as the science or business of traversing the sea in ships or vessels, is probably one of the oldest uses of the sea.[8] Discoveries and the opening up of the world would have been impossible without this science. Thus, navigation can be said to be the basis of modern civilizations. The great maritime powers of the West built their colonial empires on the principle of freedom of navigation as expressed in the concept of *mare liberum* which as has been seen influenced the development of international law of the sea during the last two centuries.[9] Navigation in the twentieth century is still a vital means of fostering global co-operation as well as an international highway for commerce and trade. About 95% of world trade is carried by sea, which makes the volume of ocean shipping directly proportional to the volume of world trade.[10] World diplomacy is still very much conducted at sea despite technological advances in nuclear and other space-age armoury.[11] With the proliferation of other uses of the world's oceans and the expansion of international commerce and intercourse, there is indeed an urgent need for regulation, particularly of commercial shipping at the international level to avoid conflicts which would otherwise occur between the different uses.[12]

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[8] C. Warbrick, "The Regulation of Navigation" in ND III, chpt. 13. See also Chapter one, Sec. A. supra; Anand, Origin and Development of the Law of the Sea. (1983)

[9] See Chapter One, Sec. C. *supra*.

[10] L. Cuyvers, Ocean Uses and Their Regulation. (1984). John Wiley & Sons, U.S.A., pp. 109-123.

[11] For example the United States policy of maintaining a military presence in the troubled parts of the world as a sign of supremacy, and also her insistence on the right to use the Gulf of Sidra in 1986 against Libyan opposition. See E. Richardson, "Power, Mobility and the Law of the Sea." (1980). Foreign Affairs. p. 902.

Traditionally, navigation has been a preferred use and interferences therewith have been strongly resisted, except during war, subject to the claims and assertions of neutral states. The traditional idea of freedom of navigation implied a two-dimensional approach to the concept of shipping. Being as it were, a fundamental principle of public international law, it meant that, on the high seas, vessels were under the sole authority of the flag state, a principle now embodied in the 1982 Convention.[13] Shipping law was therefore essentially a matter within the competence of the shipping industry or national state until quite recently, with the emergence of various international bodies such as the International Maritime Organization. Lord Diplock, in the case of The Tojo Maru observed that the choice of a proper law for a contract made in respect of

> services to be rendered to a foreign ship in foreign territorial waters and upon the high seas is between the internal municipal law of England and that of some sovereign state (and not the) maritime law of the world.[14]

He held consequently that English law applied to the Salvage

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[12] L. Henkin, op. cit.

[13] With the sole exception of pirate ships or those with no flags. See Chapter I, note 24 supra. See also, 1958 High Seas Convention (HSC), 450 UNTS II, art. 5,6. 1982 Law of the Sea Convention (LOSC), art. 90,91,92.

[14] [1972] AC. 242, 290. (emphasis added).

Agreement involved. The Admiralty Court of the Queen's Bench Division applied this decision in the similar case of The St. Blane.[15]

The tremendous increase in the number of ships and the trebling of the total world tonnage especially between 1955 and 1975, have caused serious traffic problems at sea. The carriage of dangerous cargos such as oil and other toxic substances has resulted in increased international concern for the safety of navigation. The sinking of the Titanic led to a series of maritime safety conventions, the latest of which was signed in 1974 in London.[16] Various international bodies (governmental and non-governmental), have emerged in the wake of navigational mishaps and congestions to regulate shipping with a view to preventing collisions at sea, instituting safety measures in the interest of all. Consequently, although ships on the seas are still largely subject to the jurisdiction of flag states, they still have to comply with these institutional rules and regulations which have evolved on the international plane.[17]

Essentially the extent to which shipping and navigation become subject to public law largely depends on the geographical area of such navigation. On the high seas, the general rule is freedom, but when it approaches territorial waters, then international law imposes some duties and obligations. Before discussing the rules and regulations imposed by international law however, we must identify the 'subject' of these rules. This is because neither the vessels nor the crew are subjects of international law,[18] thus the only way that public order can be maintained at sea is by acquiring some kind of jurisdiction over these. Since ships are generally regarded in international law as being under the protection of the state whose flag they fly, the nationality of a ship becomes crucial, for it is then, and only then, that the rights and obligations imposed by international law can be enforced. It is therefore the flag state which is responsible in international law for the acts or omissions of the vessel. Article 5 of the 1958 Convention on the High Seas[19] stipulates that there must be a genuine link between the state and ship which flies its flag. This requirement has been largely ignored, which is not surprising since there has not been any authoritative and clear judicial interpretation of it.[20] Article 91(1) of the

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[15] [1974] 1 Ll. Rep. 557.
[16] (1980) UKTS. 46, Came into force May, 1980 with 59 ratifications. protocol to convention also came into force, May 1981 with only 24 ratifications. See (1981) UKTS. 40. See also, N. Singh, International Conventions of Merchant Shipping. (1973) Stevens and Sons, London. Part I. Chpt. 2, pp. 57-337.
[17] 1982, LOSC. art. 94(5).

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[18] International Law rules are imposed directly on those entities which are said to have international personality. Individuals and ships amongst others, lack this personality, thus they are considered as typical objects of international law. See G. Schwarzenberger, E.D. Brown, A Manual of International Law. (1976, 6th edn.) Professional Books Ltd., pp. 43, 95, 116-117.

[19] 450 UNTS. 11; ND I. p. 257.

[20] The International Court of Justice dismissed the contention that the concept of genuine link was relevant for determining the issue before the court viz the meaning of the phrase 'the largest ship-owning nations' in the case of The Constitution of the Maritime Safety Committee of IMCO. [1960] ICJ Rep. 150. See also, R.R. Churchill *et al*. The Law of the Sea (1983) Manchester Univ. Press. pp. 179-183.

1982 Convention merely repeats this requirement which has hitherto had absolutely little or no influence on state practice and has resulted in the emergence of so-called 'flags of convenience' or open registry states. Notable among these is Liberia which ranks among the world's leading maritime nations.

The problem of 'open registry' fleets has had adverse effects on the safety and social standards required in the shipping industry, which problem has been of major concern to the Secretariat of the United Nations Conference on Trade and Development (UNCTAD). Having observed that the requirement of a 'genuine link' has had no uniform interpretation among countries, the secretariat suggested that in addition to a formal or administrative prerequisite of registration, certain nationality requirements with respect to the legal entity beneficially owning the ship must be imposed.[21] Also as part of the general effort to curb the expansion of 'open registry' fleets which has adversely affected the development and competitiveness of the fleets of developing countries,[22] the Committee on Shipping, by a resolution adopted at its third special session in June 1981 established the Intergovernmental Preparatory Group on Conditions for Registration of

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[21] "Economic Consequences of the Existence or Lack of a Genuine Link Between Vessel and Flag of Registry." UNCTAD Doc. TD/B/C.41 168. (1977). This has in fact been the general practice of some states of the European Community.

[22] *Ibid.*, See also, UNCTAD, "Flags of Convenience" (1981) 15 JWTL. 466.

Ships.[23] This group prepared a draft set of basic principles concerning conditions of vessel registration[24] as a basis for a future diplomatic conference on the issue.

Most of the ships registered in Liberia for example, are of foreign ownership. However, by reason of such registration, Liberia has a vested interest in them and issues which affect them. Consequently, her interest in navigational matters is quite opposite to those of other African states. In a statement made during the second plenary session of the Conference, the Liberian delegate acknowledged that many of the world's merchant vessels were registered in Liberia and his country would therefore

> insist that the new law of the sea placed no unnecessary restriction upon traditional freedom of navigation, which was of greatest significance to the entire world community. The Conference must...safeguard the competing and legitimate interests of freedom of navigation and sovereignty of coastal states...within the economic zone, the coastal state should exercise sovereignty over all living and non-living resources and should manage the zone so as to fully respect such long-established rights as freedom of navigation....[25]

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[23] TD/B/AC. 34/4. Annex I.

[24] "Conditions of Registration of Ships" TD/B/AC. 34/2 (1982).

[25] Official Records, UNCLOS III, Vol. I, p. 137. 33rd Meeting.

Generally, however, the share of African nations in world shipping is negligible for various reasons, besides it is increasingly difficult for them to participate equitably in world maritime transportation due to certain institutionalised practices like f.o.b. (free on board) and c.i.f. (cost, insurance and freight) contracts of affreightment. Thus in 1981, the shipping capacity of the whole region constituted only 1% of total world tonnage.[26] African states depend largely on the developed world for their shipping needs and a large volume of their sea-borne trade is done by foreign vessels. Since they are neither shipowners nor have large merchant fleets, their interest in regulating maritime transportation is minimal. Upon achieving independence, however, almost all of the African nations have joined the International Maritime Organization (IMO)[27] whose main purpose is to facilitate co-operation among governments on technical matters affecting shipping in order to achieve the highest practicable standards of maritime safety and efficiency in navigation.[28]

If the economics of shipping and navigation are to be brought under the same form of international public control as the other uses of the ocean and all within the general framework of the New International Economic Order, then the consumers' interests of developing countries must be co-ordinated and institutionalized with a view to presenting a unified system based on equitable principles, with active participation on both sides. It is in fact estimated on the basis of projected growth that over the next twenty-five years, the average annual increase in Africa's seaborne trade will be about 3.2%, meaning that by the year 2008, the volume of trade by sea would have increased to 1,346.3 million tons from 571 million tons in 1981.[29] Such a projection implies that the present vessel capacity of only 7.2 million dwt. (dead weight tonnage) from a fleet of about 290 vessels will have to be doubled or trebled to accomodate the expansion in trade volume. According to the Economic Commission for Africa's estimates, the region would require a vessel capacity of 14 million dwt. equivalent to about 570 vessels.

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[26] Economic Commission for Africa, ECA and Africa's Development, 1983-2000: A Preliminary Perspective Study (1983). Addis Ababa. p. 12.

[27] Formerly IMCO - Intergovernmental Maritime Consultative Organization. There are now 35 African members out of a total membership of 125.

[28] United Nations Handbook (1984). p. 121.

In this regard, it is interesting to note that the United Nations has declared 1978-1988 as Transport and Communications Decade in Africa. Among projects being undertaken or planned are shipbuilding, restoration of harbours and ports and other training and educational projects. Of significance also is the Code of Conduct for Liner Conferences[30] adopted by the fifth United Nations Conference on Trade and Development (UNCTAD) and which entered into force October 6, 1983. Its recommendation is based on a linkage between cargo generation and participation in world shipping. Thus, under the Convention, 80% of sea-borne trade should be transported in equal proportion by any two trading partners. Thus, African nations are entitled to carry 40% of all liner cargo which they generate themselves. This would be a radical turnabout in allocation patterns in marine transportation.[31] Part Two of the 1982 Convention relating to navigation does not deal with the economic aspects. In fact during deliberation at the Conference this aspect of marine transportation was hardly referred to by African States. Apparently they were more preoccupied with issues pertaining to sovereignty over natural resources. Thus, although they all recognized freedom of navigation as a means of promoting international trade and fostering growth, they were always quick to point out that the exclusive sovereign right of states to protect and conserve the natural resources of their territorial sea was paramount.[32] Consequently, they were willing to accord innocent passage to all international shipping in their territorial waters, but insisted that unlike the position under the 1958 Convention,[33] such passage must be clearly defined. At another level, they insisted strongly on the transit rights of landlocked states. By a special resolution in 1975,[34] the United Nationas General Assembly established a special fund for developing landlocked countries to compensate them for their additional transportation and transit costs. The Fund is financed by voluntary contributions and became operational in 1979. By December 1983, pledges totaled approximately one million dollars.[35] This should give a fair indication as to the extent of the Fund's effectiveness. If anything, this Fund will barely cause a ripple in a vast pool of financial difficulties faced by these countries, given that most of these states rank among the poorest nations of the world.[36]

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[29] Economic Commission for Africa., op. cit. note 26, p. 43.
[30] Text in (1974) 13 I.L.M. 917.

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[31] Cuyvers, op. cit. pp. 109-118.
[32] Statements by delegates from Equatorial Guinea and Tunisia. Official Records, UNCLOS III, Vol. I., p. 146, para. 42, p. 153, para. 53 respectively.
[33] Convention on Territorial Sea and Contiguous Zone, 516 UNTS. 205.
[34] Resolution (3504) XXX of 1975.

At the Conference, the landlocked states of Africa submitted the Kampala Declaration[37] calling to mind the vital role and importance of free access to and from the sea, as well as free transit and other facilities in the process of their economic development, thereby declaring the 'right of landlocked states to free and unrestricted access to and from the sea' as one of the cardinal rights recognized by international law.[38] They also insisted that transit states should respect and facilitate the exercise of this right as well as that of free and unrestricted transit, providing them with all other facilities necessary for traffic in transit. As a follow-up to this declaration, several African landlocked states co-sponsored various documents on the rights of landlocked and geographically disadvantaged states.[39]

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[35] Note 28, *supra.* p. 91.
[36] See Alexander & Hodgson, op. cit., note 4.
[37] U.N. Doc. A/CONF. 62/63. (1974).
[38] This right was first recognized under the Treaty of Versailles in 1919 whereby the parties agreed to recognize the flag flown by the vessels of a landlocked party. See 225 CTS 189, art. 273. See also, Declaration Recognizing the Right to a Flag of States Having No Sea Coast adopted at the 1921 League of Nations Conference on Communications and Transit. 7 LNTS 14; M.A. Sinjela, Landlocked States and the UNCLOS Regime. (1983) Oceana Publications, pp. 39-51.

The 1982 Convention specifically provides for these cardinal rights of landlocked states, in addition to general provisions on innocent passage and other navigational rights.[40] Part Ten of the Convention comprising nine articles is dedicated to the right of access of landlocked states to and from the sea and freedom of transit. Article 125 gives a landlocked State the right of access to and from the sea for the purpose of exercising its conventional rights including the freedom of the high seas and rights under the 'common heritage' concept. To this end, a landlocked state shall enjoy freedom of transit through the territory of transit states by all means of transport. By 'means of transport' is meant railway rolling stock, sea, lake and river craft and road vehicles; or where local conditions so require porters and pack animals. Although this is a significant departure from the 1958 Conventions, one may ask, to what extent the impoverished landlocked states of Africa would benefit from these seemingly all-embracing provisions.

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[39] See A/AC 138/93, Draft Articles Relating to Landlocked States sponsored in part by Mali. A/CONF. 62/C.2/L.29, Explanatory Paper on Draft Articles Relating to Landlocked States in Doc. A/AC 138/93 sponsored in part by Botswana, Burundi, Mali, Swaziland, Uganda, Upper Volta, and Zambia.

[40] See articles 17, 38(1), 52(1), 53(2), 58(1) and 90 of 1982 L.O.S. Convention; Article 14(1) of 1958 Convention on Territorial Sea and Contiguous Zone; Article 2(1), 4, of 1958 Convention on High Seas.

Article 125(1) which confers these rights[41] appears to render them virtually nugatory by conditions stipulated in its subsections 2 and 3. Subsection 2 states that

> the terms and modalities for exercising freedom of transit [42] shall be agreed between the landlocked states and transit states concerned through bilateral, sub-regional or regional agreements.

Subsection (3) gives the transit states

> in the exercise of their full sovereignty over their territory...the right to take all necessary measures to ensure that the rights and facilities provided...for the landlocked states in no way infringe their (own) legitimate interests.

In effect, transit states must in good faith conclude transit agreements with neighbouring landlocked states, but it leaves open who is to decide which are the legitimate interests of transit states. Probably the only significant provision under this part is the exclusion of the application of the most-favoured-nation clause in article 126. The rest of the articles leave a great deal to the goodwill and cooperation of the transit state. A resolution of the inherent ambiguities of these provisions is crucial for the implementation of such agreements. The Convention does not spell out the details of such agreements (it is impossible given national diversities), but it recommends co-operation among all states concerned. To a very large extent, therefore, these rights of landlocked states depend for their operationability on the 'good will and co-operation' of states. Clearly without the support of a significant majority of transit states[43] the assured access provided by the convention will prove to be futile and practically empty.

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[41] It is doubtful whether under customary international law there is a general right of transit. In the Right of Passage Case (1960) ICJ Rep. 6, the court refrained from expressing a view on the matter. Freedom of transit or access to the sea can therefore only be attained by treaty. See Schwarzenberger *et al*. op. cit. pp. 87-90. See further, M.I. Glassner, Access to the Sea for Developing Landlocked States., (1970) Martinus Nijhoff. pp. 16-35; Sinjela, op. cit.

[42] which is a *sine qua non* for the exercise by landlocked states of their 'cardinal rights' of access to and from the sea.

Policy decisions taken at regional and international level between states are greatly influenced by a broad spectrum of political and ideological factors. The recent history of failure of many regional institutional arrangements[44] makes it almost impossible to predict future implementation in this regard.

In the southern part of the continent where there is a concentration of landlocked states[45] it seems that undue pressures will be exerted on countries like Zaire and Tanzania both of which have five contiguous landlocked states. However, it appears that current political tensions with the Republic of South Africa have served to bring these states together. Thus, in 1979 at Arusha, the Southern African Co-ordination Conference, comprising the so-called frontline states[46] met to discuss areas of potential mutual co-operation. Transportation and communication was recognized as one such area. In this connection, it is interesting to note that in 1981, at an important inter-governmental meeting on transportation matters between Tanzania, Burundi, Rwanda and Zaire, there was a recognition of the importance of 'collective self-reliance in economic matters on a regional basis' as a pivotal strategy for their political and socio-economic emancipation.[47] Notable also is the 1980 agreement between Tanzania and Burundi relating to the acquisition by the latter of additional rolling-stock for use on the Dar-es-Salaam-Kigoma-Bujumbura Line and the development of the ports at Kigoma and Bujumbura.[48]

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[43] Article 124 (6) of the 1982 Convention defines a transit state as a state with or without a sea-coast situated between a landlocked state and the sea, and through whose territory traffic in transit passes.

[44] For example the defunct East African Community.

[45] These are Botswana, Burundi, Central African Republic, Lesotho, Malawi, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe.

In the West African region which also has its fair share of landlocked states, it is difficult to find such coalescence as exists in the southern part. However, it is interesting to note the agreement between Upper Volta and Mali (both landlocked) on Public Transportation.[49] Upper Volta undertook to provide at various points facilities for handling and storage of goods from Mali, to facilitate customs and administrative formalities at their frontiers as well as expedite trade between them. This is particularly helpful since Mali's shortest access to a seaport is through Ivory Coast via Upper Volta, a distance of about 1,170 kilometers.[50] But its importance must again be emphasized, for as the delegate from Kenya put it,

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[46] They are Angola, Botswana, Lesotho, Tanzania, Zambia and Zimbababwe

[47] E.E. Mtango & F. Weiss, "The Exclusive Economic Zone and Tanzania: Considerations of a Developing Country." (1984) 14 ODILA 1, 29.

[48] *Ibid* at note 141.

[49] Cervenka, op. cit.

> [n]o state could allow any other state the right of transit through its territory outside the framework of bilateral or regional arrangements...because the transit state's duty to its citizens to maintain security and law and order would be jeopardized if such _an_ _unreasonable_ _right_ were to be recognized.[51]

C. GEOGRAPHICAL LIMITS

From the broad perspective of the international law of the sea, the regulation of maritime navigation is still largely dependent on where such navigation is being conducted. Although the traditional doctrine of freedom of navigation has been largely preserved, several inroads have been made. It is not intended here to discuss the detailed rules regarding marine transportation since the present purpose is merely to discuss African perspectives on the law of the sea. However, for the sake of completeness, the concepts of internal waters and territorial seas which basically constitute legal limitations on the traditional doctrine of freedom of navigation will be briefly discussed. The concept of the economic zone which was the major concern of the African states[52] at the conference does not have any appreciable impact on the freedom of navigation. Article 58 ensures that the freedom of the high seas, specifically of navigation and overflight are preserved in the exclusive economic zone. Thus, the extended national jurisdiction can be said to have left navigation undisturbed in this extended national zone.

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[50] See Appendix 3.

[51] 34th Meeting, Official Records, Vol. I, UNCLOS III, p. 253, para 10.

INTERNAL WATERS

Internal waters comprise all bodies of water lying on the landward side of the baseline from which the territorial sea is measured.[53] The coastal state has complete sovereignty in respect of this area which is in fact considered as an integral part of the coastal state's territory.[54] The significant aspect of this concept which will affect the status of navigation seems to be the introduction of straight baselines in accordance with article 7 of the Convention. The use of such straight lines, recognized in the Anglo-Norwegian Fisheries Case[55] has been further modified. These may be used in localities where there is a fringe of islands very close to the coast, or in deltaic and other unstable coastlines. The baselines in such geographical conditions are to be drawn by joining appropriate points along the furthest seaward extent of the low water line, which once drawn is to remain in effect regardless of subsequent regression of the coast. However, these baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the line must be sufficiently linked to the land domain to be subject to the regime of internal waters.

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[52] See, R.H. Manley, "Developing Nation Imperatives for a New Law of the Sea: UNCLOS I And III as stages in the International Policy Process." (1979) 7 ODILA 9-18; Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference." Ibid. p. 89.

[53] Art. 8, 1982 LOSC., Art. 5(1) 1958 Convention on Territorial Sea.

[54] Churchill *et al.*, op. cit., p. 45.

[55] [1951] ICJ Rep. 116.

Article 7 (5) of the 1982 Convention is very significant from the point of view of most African coastal states. It provides that, in determining appropriate points for drawing these straight baselines, account may be taken of economic interests peculiar to the region concerned, the reality and importance of which is evidenced by long usage. Such considerations partly influenced the court's decision in the Anglo-Norwegian Fisheries Case, for as was observed:

> [i]n these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing. Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.....[T]here is one consideration (which must) not be overlooked, the scope of which extends beyond purely

> geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[56]

As far back as the seventeenth century, similar considerations formed the basis of the exclusive Scottish claims to 'reserved waters' off the west coast of Scotland, in opposition to pretensions then being made by the King of England.[57]

In this regard mention may be made of the living and non-living resources particularly on the western coast of Africa. Most of the fishery resources of the area lie immediately off the coast and tend to be heavily exploited.[58] Besides there are numerous rivers flowing into the sea, so the tendency to extend baselines further seawards by the use of straight baselines is more than likely to be present, or is in fact present.[59]

Given the above considerations and other peculiarities specified in the 1982 Convention[60] new areas will be included in the internal waters of most coastal states. States are said to have complete sovereignty over their internal waters. The corollary of this is that there is, generally speaking, no right of entry or access for foreign vessels. In effect, the doctrine of freedom of navigation[61] does not apply to such waters.

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[56] Ibid. 128, 133.

[57] See Fulton, op. cit., pp. 209-245.

[58] J.A. Gulland, The Fish Resources of the Ocean. (1971) Rome: FAO; FAO Yearbook of Fisheries Statistics, (1979) Rome.

[59] In fact, most of the national legislations specify points to be used in drawing baselines especially in the case of islands and archipelagos like Cape Verde. Seychelles, however, defines a baseline in her Maritime Zones Act (1977) infra chpt. 4 as "the baseline determined in accordance with the straight baseline system." Togo uses the low-water mark ie. the normal baseline, whilst Cameroon uses a mixture of both the normal and the straight baseline systems.

[60] Article 6: Reefs, Art. 10: bays; Art. 11: Ports; Art. 12: roadsteads; Art. 13: lowtide elevations.

The right of access to ports and internal waters for vessels of all states is strictly a matter of negotiation between the littoral states and others. Generally, access to ports and other internal waters is granted by way of treaty or some other such agreement,[62] but the littoral state still reserves the right to prescribe conditions for such access. The law was aptly stated by Chief Justice Waite in the Wildenhaus Case:

> (i)t is part of the law of civilized nations that when a merchant vessel of one country enters the port of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement...

From experience however, it was found long ago that

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[61] See Schwarzenberger, *et al*., op. cit., pp. 87-90, 108-112.
[62] Ibid., See also, Oppenheim, International Law [1967, 8th edn. by H. Lauterpacht] Vol. I, pp. 502-504; G. Schwarzenberger, International Law as Applied by International Courts, (1957), p. 199; M.S. McDougal *et al*. The Public Order of the Oceans. (1962), pp. 89-173. The contrary view that such a right exists under customary law expressed by Colombos is not widely accepted See C.J. Colombos, The International Law of the Sea. (1959), p. 176.

> it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship...[a]nd so by comity, it came to be generally understood among civilized nations that all matters of discipline and all things done on board (which) did not involve the dignity of the country or the tranquility of the port should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged.
>
> But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of local laws for their punishment.[63]

The United States Supreme Court in determining the ambit of a restriction prescribed by Congress in respect of seamen's wages in the case of Patterson v. Bark Endora[64] endorsed this statement of the law and explained further that:

> the implied consent of the government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbours to the nations to which such vessels belong may be withdrawn.
>
> ...Indeed the implied consent to permit them to enter our harbours may be withdrawn, and if this

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[63] (1887) 120 U.S. I at 11-12.

[64] (1903) 190 U.S. 169.

> *implied consent may be wholly withdrawn it may be extended only upon such terms and conditions as the government sees fit to impose.*[65]

This right of access is generally granted under various multilateral and bilateral treaties of Friendship, Commerce and Navigation and there is therefore generally, no customary right of access[66] subject only to the two exceptions discussed below.

Most African countries have signed a number of such bilateral treaties with other states. Ships in internal waters by reason of such treaties are still subject to the normal legal process of the coastal state[67] are thus even liable to seizure for various offences involving either the criminal code or other civil liabilities.

There are, however, two exceptions to the exercise of this coastal state jurisdiction over ships in internal waters. As a result of customary development ships in distress have a right to seek shelter and access and whilst there they can enjoy certain immunities from local jurisdiction. As expressed by the Canadian Court of

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[65] *ibid* p.175 (emphasis added). See also notes 61. & 62 *supra*

[66] Consequently the statement in the *Aramco Arbitration* (1958) 27 ILR 117, 212 that "according to a great principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the state so require" must be interpreted narrowly within the particular context, that the exercise of this sovereign right to grant access must be non-discriminatory and must be in good faith. See further, A.V. Lowe, "The Right of Entry into Maritime Ports in International Law." (1977) 14 *San Diego L. Rev. 597* *et. seq.*

[67] T. Twiss, *The Law of Nations* (1884) Sec. 166, pp. 272-3. Oppenheim, *op. cit.*, Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p.

Exchequer in Cushin et. al. v. Lewis:

> it is a well recognized principle supported by the jurisprudence as well as by the opinions of authors on International Law that a ship compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is on grounds of comity, exempt from liability to the penalties or forfeitures which had she entered the port voluntarily, she would have incurred.[68].

The second exception which is normally limited to the maritime belt or territorial waters, is the right of innocent passage, which some writers prefer to describe as a servitude.[69] Article 8 (2) of the 1982 Convention which confers this right restricts it to such waters as would be enclosed as a result of drawing straight baselines, so that it does not apply to the whole of a state's internal waters. Thus, innocent passage in internal waters as a conventional right applies only between state parties. Non-parties seeking to claim such a right must show that customary international law grants such a right in internal waters.

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[68] [1935] Ex. C.R. 103, See also Kate A. Hoff vs. United Mexican States. (The Rebecca) [1929] IV RIAA 444 at 446-447. See also note 62 supra.

[69] An international servitude is a restriction on the territorial sovereignty of a state, normally by treaty and constitutes a real right whereby the territory of one state for some specified purpose is made liable to permanent use by another. On this see: F.A. Vali, Servitudes of International Law. (1958) Stevens & Sons, London, pp. 56-63, 309-12; H. Lauterpacht, Private Law Sources and Analogies of International Law. (1922) [1970 Reprint] Archon Books, pp. 121-125; A.D. McNair, "So-called State Servitudes" (1925) 6 BYBIL 111-127.

However, some states have statutes regarding navigation in their territorial waters, including internal waters, and may grant this. In such a case, it is being granted by the coastal State and not under any rule of international law. A case in point is the 1975 Decree of Cape Verde (an island state) concerning the territorial sea.[70] Article 2 permits innocent passage in peacetime in the territorial waters and internal waters for the purpose of international navigation. But the Maritime Zones Act (1977)[71] of Seychelles which is also an island state allows innocent passage only through its territorial waters.

Innocence of passage can be negated by any actual or constructive breaches of the provisions of article 19 (2) of the convention: acts which would be prejudicial to the peace, good order or security of the coastal state. This right of innocent passage does not really guarantee a total immunity from local jurisdiction to the foreign vessel.[72] Such a vessel must obey reasonable rules and regulations laid down by the littoral state in the interest of navigational safety and maritime police.

TERRITORIAL WATERS

The concept of the territorial sea has been the most significant restriction on the freedom of navigation in the history of maritime law. As a result it has been a much vexed topic in the international law of the sea and been the subject matter of a number of treatises[73]

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[70] UNLS , ST/LEG/SER. B/19. PT I, chapt. 5, p. 13.
[71] Ibid Pt. I, chpt. 28, p. 102.
[72] Jessup. op. cit., pp. 121-123.

This concept was based originally on the principle of protection. Since it had become an accepted principle of public international law that the use of the sea as a commercial link for even the remotest regions of the earth should remain unrestricted, there was clearly a need for coastal states to assume this jurisdictional authority over their adjacent waters in order to protect their security. Thus, coastal state sovereignty over an adjacent maritime belt was recognized even though its extent has been and still is controversial.[74]

In most parts of the African continental coastline, this maritime belt adjacent to the coast contains the richest and highest concentration of living resources. Thus quite apart from traditional theories about coastal state security, the struggle for wider territorial claims has tended to have an economic aspect attached thereto. As the delegate from Guinea stated at the twenty-first meeting of the Plenary Session at the Third Conference on the law of the sea,

> the way to ensure that the exploitation of land and marine resources benefited all peoples was to guarantee the security, independence and sovereignty of countries [and in the light of subtle trends

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[73] For example, Jessup, op. cit., W.E. Masterson, Jurisdiction in Marginal Seas (1929) MacMillan, New York.
[74] See chapter one, note 104, supra.

> towards the undermining of the security of the economic basis of states, particularly developing states, Guinea would] *uneqivocally* affirm its minimum limit of 130 nautical miles as territorial sea.[75]

It is now an incontrovertible rule of international law that the sovereignty of a state extends beyond its land territory and internal waters to the adjacent belt of sea, the seabed and subsoil and airspace thereof.[76] Article 3 of the 1982 Convention which defines the breadth of the territorial sea states that every state shall *have the right* to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from the baselines determined in accordance with relevant provisions of the convention. It may be observed that this twelve mile limit is not mandatory, so a state may rightly choose to limit its territorial sea to the traditional three-mile limit,[77] but it may not claim more than twelve nautical miles for a territorial sea. Having signed and ratified the convention therefore, Guinea must re-adjust its claim of a hundred and thirty nautical miles of territorial sea.

African state practice regarding the extent of the territorial sea has hitherto been very divergent. The late sixties and early seventies witnessed a wave of unilateral extensions of maritime sovereignty, either in the form of a territorial sea or exclusive fishery zone (a practice not limited only to Africa) ranging from twelve miles to about two hundred miles seaward.[78] As the Kenyan delegate pointed out,

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[75] Official Records, UNCLOS III, Vol. I. p. 63, para. 57-9.

[76] Article 1, 1958 Territorial Sea Convention, Article 2 (1), 3, 1982 Convention on Law of the Sea.

[77] See Fulton, *op. cit.*, pp. 251-354, Walker, "Territorial Waters: The CannonShot Rule" (1945); Jessup *op. cit.*.

> many African states claim territorial sea extending beyond twelve nautical miles, the range being from eighteen to two hundred miles. In fact only eleven out of twenty-nine coastal states claim a twelve-mile limit.[79]

Since the rationale for these unilateral extensions was the protection of marine resources, and the convention now endorses an exclusive resource zone of two hundred nautical miles from the baseline, it is safe to presume that there is no longer any reason to claim a territorial sea beyond the traditional three miles, or the conventional twelve. Consequently, African states who claim more than these limits may have to readjust such claims.

The significance of a territorial sea from the public law perspective really lies in the nature of the legal rights and duties that states have therein. This is because the sovereignty which a coastal state possesses over its territorial waters not only confers sovereign rights, but imposes duties and obligations as well, the enforcement of which belongs to international law. As Judge Alvarez explained in the *Corfu Channel Case*,

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[78] The various claims of the African states have been fully documented elsewhere and need no further elaboration here, See, Churchill *et al.* N.D. Vol. VI (1977); Rembe, Africa and the Law of the Sea (1980) Appendix IV. Only Côte d'Ivoire has consistently adhered to a six-mile limit.

[79] Official Records, UNCLOS III, Vol. I, p. 82, para. 42.

> the passage of the merchant ships...of a state through the territorial water of another state is of high importance...(and) is a right possessed by merchant ships belonging to other states.[80]

This right of innocent passage is as old as the concept of the territorial sea itself and no nation can refuse such access to "non-suspected vessels" without infringing its duty.[81] What then is this right of innocent passage?

INNOCENT PASSAGE

The definition in articles 18 and 19 of the 1982 Convention regarding innocent passage may be safely regarded as being declaratory of the existing customary and conventional law. These articles make a few modifications but the concept remains intact. Thus, passage as defined in article 14 (2) (3) of the 1958 Convention on the Territorial Sea and article 18 of the 1982 Convention is basically the same. Passage is navigation through the territorial sea for the purpose of traversing without entering internal waters, proceeding to or from internal waters or calling at a roadstead or port facility outside internal waters. Such a passage must be expeditious and continuous, thus dropping or anchoring in this area is permitted only in so far as the same is incidental to ordinary navigation, or has been rendered necessary by distress or force majeure. Article 14 (4) of the 1958 Convention stipulates that such passage, to be innocent and therefore permissible, must not be prejudicial to the peace, good order or security of the coastal state. Its 1982 counterpart, however, goes further to give specific instances where such passage may be considered prejudicial to the peace, good order and security of the coastal state.[82] It is interesting for present purposes to note subsections (a) and (1) of article 19 (2). Article 19 (2) (a) (1) states that the passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal and therefore not innocent, where during the passage, the ship engages in

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[80] [1949] ICJ Rep. 46.

[81] E. de Vattel, *Le droit de Gens*. (1758) Vol. I, p. 248.

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state or in any other manner in violation of the principles of international law embodied in the charter of the United Nations.[83]

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[82] 1982 LOSC, Art. 19 (2) (a-1).

[83] Evidently article 19 (2)(a) merely reiterates the principles laid down in article 2 of the United Nations Charter with special emphasis on subsection 4 which compels all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. The ambiguities involved in giving a precise meaning to this subsection led the General Assembly to adopt Resolution 2625 (XXV) in 1970, specifically proclaiming principles of international law concerning friendly relations and cooperation among states. However, see E. McWhinney, "The 'New' Countries and the 'New' International Law. The United Nations Special Conference on Friendly Relations and Cooperation Among States." (1966) 60 AJIL 1. In view of the relative ineffectiveness of international law to compel these notions and principles, they must be regarded as of mere academic and theoretical importance. The normal practice has been, at

and (1)

> any other activity not having a direct bearing on passage.

Presumably (1) was put in to make up for any omissions in the provisions, and seems to imply an indirect application of the *ejusdem generis* rule to an international convention.[84] Moreover, most of these subsections may have a direct impact on the military uses of the sea.[85] The overall effect, from the African perspective, seems to be to afford a protection from naval or maritime aggression by former colonial powers as well as other superpowers, and to ensure the non-violation of their newly acquired and internationally-recognised political and economic sovereignty.

On the other hand, this wide definition may allow less scope for a wider interpretation[86] and less opportunity for

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[83](cont'd) least for African states, to lodge a complaint alleging a breach or violation of these principles to the Security Council either during or after the alleged breach. See further, M. Virally's commentary on article 2 (4) in Le Charte des Nations Unies edited by Jean-Pierre Cot, Allain Pellet. (1985) Editions Economica, pp. 113-125.

[84] The view is generally held that the universally accepted principles of interpretation of private law contracts and statutes may be applied to the interpretation of treaties. See Lauterpacht, note 69 *supra*. But see article 31 of the Vienna Convention on the Law of Treaties. See also separate opinion of Judge de Castro in the Fisheries Jurisdiction Case (Germany Fed. Rep. v. Iceland) ICJ Rep. 1974, p. 226.

[85] 1982 LOSC. art. 19 (2) (b) (c) & (f).

[86] Subsections (a) and (l) could be interpreted widely enough to encompass threats directed against non-coastal states, for example an American vessel in the territorial waters of Angola believed to be carrying food supplies for rebels based in Nigeria and trying to overthrow the government in Burkina Faso. This is now a common scenario in most of Africa.

the abuse of their right to prevent innocent passage. As the Corfu Channel Case suggests, it is for an objective tribunal to determine the innocence of the passage.

The obligation to permit innocent passage imposes certain duties which may prove expensive for most coastal states in Africa. These include the duty to give appropriate publicity to navigational dangers within the territorial sea (article 24 (2)). This duty is based on general and well-recognized principles of freedom of maritime communication and elementary considerations of humanity.

Failure to warn of imminent dangers in good time as the Corfu Channel Case indicates is a breach of an international responsibility for which compensation may be payable in the event of any damage. This makes the responsibility on a coastal state who claims twelve miles of territorial sea even greater. Provision of coast guards and patrol ships could be very expensive as the American delegate to the 1958 Conference observed,

> any extension of the territorial sea from three to twelve miles would mean an increase in the cost of patrolling the larger area...and would entail additional expenditure of perhaps hundreds of millions of dollars annually.[87].

Since most African states are poor and face serious domestic problems of famine and underdevelopment, a vital choice faces them in redefining their territorial sea limits, and they would have to balance carefully conflicting political and economic factors in determining their priorities.

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[87] Official Records, UNCLOS I, Vol. 3, p. 26, para. 8

It is the opinion of the present writer that most African states will claim the conventional twlelve miles without properly weighing the economic implications. Hopefully, though they may not have to deal with situations like the mining of the Corfu Channel.

Finally, the coastal state is given certain legislative and enforcement jurisdiction in the territorial sea. Most African states already have laws regarding the activities of foreign vessels in their territorial waters. Article 21 of the 1982 Convention specifies a number of subjects in respect of which the littoral state may legislate. These include the safety of navigation and regulation of marine traffic, in addition to and in conformity with various international conventions like those for the prevention of collision.[88]. However, article 21(2) states that such laws shall not apply to the design, construction, manning or equipment of foreign ships except in so far as compatible with generally accepted international rules, and standards.

They also have legislative powers in respect of the protection of cables and pipelines, conservation of living resources, preservation of the environment and prevention of pollution, as well as the power to enforce compliance, or prevent infringement of any of these provisions.

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[88] For example, The Convention on the International Regulations for Preventing Collisions at Sea, signed in London, October 20, 1972 and came into force July 15, 1977 with seventy-eight ratifications. [1977] UNTS 77

Normally, most of the national legislations prescribe fines and terms of imprisonment or seizure of vessels as the penalty for infringing laws relating to the territorial sea. These could very well delay shipping which is clearly an undesirable interference with navigational freedoms, especially for commercial purposes. But in all this, the coastal state is expected to act with good faith and be non-discriminatory.

IV. CHAPTER THREE

A. EXTRACTIVE USES AND THE ALLOCATION OF MARINE RESOURCES.

Oceanic researches and other scientific strides achieved by a few technologically advanced countries have brought to light unimpeachable evidence of the considerable riches of the world's oceans, as well as man's ability to occupy and use ocean space not only for peaceful purposes but also as a potential area for military manouvres. Quite apart from the traditional extraction of food resources from the sea, other marine non-living and organic resources have assumed a certain importance. The need therefore for a prudent and equitable use has never been as crucial as it is now in the light of actual and potential conflicting uses. The traditional concept of the freedom of the high seas has been put in sharp perspective *vis-a-vis* contemporary trends of extending territorial or national sovereignty seawards. Overfishing, pollution, navigational hazards are but a few of the issues which have prompted a global concern for a new law of the sea. This global concern is reflected in Ambassador Arvid Pardo of Malta's proposition that only the concept of the ocean space and its resources as a "common heritage of mankind" could provide a satisfactory framework for an equitable international order, ensuring simultaneously the management of both living and non-living resources and preservation of the marine environment in the interest of all.

This emerging concept of a common heritage has been treated in a most cavalier fashion by a majority of contemporary western writers on international law.[1] But the point is that one principle which seems to have been agreed upon by all nations[2] and which may well shape the course of customary development of international law, as did the Grotian concept of *mare liberum* in the eighteenth century, is that the deep seabed is the common heritage of mankind, and states are not free to do as they please thereon. This view becomes even more vital in a world fraught with problems of disarmament and peaceful co-existence and economic justice. Thus, this concept which has been described as 'an idea on the borderline between dream and reality'[3] may very well achieve realism.

From an African perspective, however, there are much wider issues at stake than just the management and protection of the hydrospace. For them any ocean management regime must necessarily be juxtaposed to the establishment of a new international economic order, a notion which was formally proclaimed at the Non-Aligned Summit in Addis-Ababa in 1973.[4] This notion was endorsed by the United Nations in May 1974 in the General Assembly Declaration and Programme of Action on the establishment of a New International Economic Order,[5] whereby member states solemnly proclaimed their determination to work urgently towards the establishment of a new international economic order based *inter alia* on equity, sovereignty and interdependence in order to correct inequalities and redress existing injustices. This programme of action calls for vital changes in the structure of global production as well as full control over the use of the natural resources in order to eliminate the widening gap between the developed and developing countries and to ensure an accelerated economic and social development.

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[1] See for example B. Buzan, Seabed Politics. (1976) Praeger: New York. pp. 65-71, R.C. Ogley, Internationalizing the Seabed. (1984) Gower Publishing, England. But see, D.P. O'Connell, The International Law of the Sea. (1982), Vol. I , pp. 457, 459, *et. seq.*.

[2] Even the United States which is opposed to the 1982 Law of the Sea Convention mainly because of the provisions relating to the International Seabed Regime. This is evident from the Deep Seabed Hard Mineral Resources Act of 1980, which specifically acknowledges the commitment of the United States to the 1970 United Nations General Assembly Resolution, 2749 (XXV) declaring *inter alia* the principle that the mineral resources of the seabed are the common heritage of mankind. See Public Law No. 96-283, 94 Stat. 553, 30 USC 1401, Sec. 2(7).

[3] Ogley, op. cit. pp. 31-42.

The former Secretary-General of the United Nations, Kurt Waldheim in his inaugural address at the opening of the fourth session of the third conference on the Law of the Sea acknowledged this need, and observed that

> [a] unique opportunity that might not recur would be lost if the uses made of the sea were not subject to orderly development for the benefit of all and if the law of the sea did not succeed in contributing to a more equitable global economic system.[6]

Thus,

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[4] See Vol. 12 ILM. 996.
[5] See Vol. 13 ILM. 715.
[6] Official Records UNCLOS III, Vol. V, p. 3, para. 7. Emphasis mine.

> the successful outcome of the work of the conference would (undoubtedly) have a major impact on the establishment and implementation of the New International Economic Order.[7]

Rhetoric or not, the concept of a new international economic order was an all-pervading issue at the conference as far as the African states were concerned. One of the major legal tasks was to elucidate the scope and implications of general and broad principles of international law and to elaborate norms and regulations in relation thereto. This is especially true in respect of such principles as embodied in the Declarations on Permanent Sovereignty over natural resources[8] and the Common Heritage of Mankind.[9] As Kamal Hossain,[10] Director of the Research Center for the New International Economic Order, remarked in an address delivered to the Philippine Branch of the International Law Association in 1980, the principles which are invoked to support proposals for change reflect some of the principal concerns of the developing countries seeking the protection of the law which, in even so decentralised a system as the international society with neither a legislative nor executive organ, could well contribute in a variety of ways to advance the objective of orderly change. Thus for him,

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[7] Ibid.

[8] See, Gen. Assem. Resolutions 1803 (XVII), 3016 (XXVII), 18th Dec. 1972; 2692 (XXV), 11th Dec. 1970; 3201 (S-VI), para. 4e, 1st May 1974; 3202 (S-VI), Sec. 8, 1st May 1974.

[9] Gen. Assem. Resolutions A/Res/2574 (XXIV), 1969; A/Res/2749 (XXV), 1971.

[10] "The Role of Law and Lawyers in the Building of the New International Economic Order: A Challenge to Legal Creativity." (1981) 7 Philippine Yearbok of International Law, p. 98.

> law should operate in the sphere of international economic relations as it has done in certain constitutional systems by way of affirmative action or reverse discrimination to promote the realisation by the developing countries of their right to equality of opportunity.[11]

It is from this perspective that the law concerning the extractive uses of the sea as laid down by both conventional and customary international law of the sea is discussed. There will also be an examination of the extent to which Hossain's objective will be realised in the existing and proposed regime. Fisheries, constituting a major and important use will be discussed first. Under a broad umbrella of marine minerals, the extraction of hydrocarbons and hard minerals will be considered. Since the geographical occurrence of these minerals offshore largely determines the legal regime for their extraction, separate examination of each is appropriate, consequently these are discussed under hydrocarbons and seabed minerals. Before proceeding to the specifics, however, it is expedient to discuss the broad framework of international resource management as applied to the oceans.

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[11] _ibid_., p. 102.

B. ALLOCATION OF GLOBAL RESOURCES[12]

For centuries there have been problems of resource allocation and utilization among individual states, particularly in respect of boundary waters and fisheries. However, the problem of a global resource management in the 1970's has been sharply put in perspective as evidenced by competing claims between developing countries on the one hand and the developed on the other for a greater national control over the hydrospace. These claims have produced a profoundly altered regime of resource utilization over the oceans, the newly found wealth of which seems to be the silver lining which the poor developing countries of the world have always looked for. Thus not only have the principle of *res communis* and its corollary *mare liberum* been attacked as inequitable criteria for the exploitation of oceanic resources,[13] their very application has been greatly reduced by the vast extensions of exclusive resource zones seawards. Consequently, the allocation and management of oceanic resources present a much more difficult picture than that of land based resources.

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[12] For in-depth economic analysis outside the purview of the present work, See: R.N. Arad, W.B. Arad, *et al.*, Sharing Global Resources. (1980) McGraw-Hill Book Co., New York; K.D. George *et. al.*, The Allocation of Resources (1978) Allen & Unwin Ltd., London; O. Schachter, Sharing the World's Resources (1977) Columbia Univ. Press.

[13] The idea of *res communis* as applied to the oceans has already been discussed, See Chapter one supra. This idea gave birth to the common property idea which has long been criticised by economists as an unsuitable natural resource policy. It has often been referred to as "the tragedy of the commons." See S.V. Ciracy-Wantrup, *et al.*, "Common Property as a Concept in Natural Resources Policy." (1975) 15 Nat. Res. Jour, 713-727.

The allocation of the latter presents relatively very little problem. This is because, from a very simple perspective, the right to use and develop a particular land-based resource is purely a matter within the realm and competence of the sovereign state. In municipal law unlike public international law, principles governing the management and allocation of a particular resource are based on a narrowly defined concept of the public good as developed by economists and policy decision-makers. For most land-based resources therefore, a fundamental policy is the public ownership of resources subject to grants and alienations by the sovereign. Such grants and alienations are based on the nature of the resource, its scarcity and more importantly dictates of national interest or public policy.

In the present era, oceanic resources can be said to have acquired a scarcity value, since for many of them, particularly fisheries, the condition that permitted the maintenance of their *res communis* character no longer exists.[14] The scramble by states to appropriate the ocean and its resources reflects the economic desirability of establishing satisfactory property rights in respect of these resources, as well as the political pressures for a more equitable global redistribution of the wealth of the oceans.

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[14] See W.F. Newton, "Inexhaustibility as a Law of the Sea Determinant." (1981) 16 Texas Inter'l Law J. p.321, F.T. Christy, "Property Rights in the World's Oceans." (1975) 15 Nat. Res. Jour. 701-5.

Under municipal law, the standard analysis used by economists for evaluating the efficiency of resource allocation is the doctrine of the *pareto optimum*[15] which presupposes a general increase in economic welfare whenever there is an increase in the welfare of any group in society without affecting the status quo, or making any one worse off. This *pareto optimum* is based on certain *a priori* assumptions and value judgements suited to a free market economy,[16] but which can hardly be made in an international economy such as we have.

Thus, as far as oceanic resources are concerned, it is an interplay of economics and politics and law which provides a framework for resource allocation.

Unfortunately, no single body of doctrine has emerged as 'an international law of natural resources,' but international resource policies have generally reflected three approaches to the issue, all of which are present in the 1982 Convention on the Law of the Sea.

First, in formulating resource policies, international law seeks to provide a set of techniques and rules whereby rights of access to and control of resources among individual states are determined. In respect of oceanic resources, these rules and techniques have involved a combination of national and international controls the scope of which is determined by the geographical and legal concepts provided by both the customary and conventional law of the sea.[17]

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[15] K.D. George *et al.*, op. cit., note 12, pp. 19-30.
[16] ibid .

Secondly, international law lays down broad principles whereby underlying differences in views of equity and fairness can be favourably resolved. Such principles are reflected in a host of United Nations Declarations such as those relating to Permanent Sovereignty over Natural Resources, the Common Heritage of Mankind,[18] the Charter of Economic Rights and Duties of States as well as that establishing the New International Economic Order.[19]

The third has been to estabish an atmosphere promoting international co-operation and interdependence amongst others. This last approach has met with mixed reactions from states especially in the developing world. Some have adopted the view that such cooperation or interdependence is in reality more one of dependence, since

> the policies required for global cooperation are essential for the major powers and many other states as well, but in some cases they might be a luxury that highly dependent states cannot afford...
> Until more equitable relations between developed and developing states are achieved we cannot expect the latter to jump enthusiastically on the international cooperation bandwagon.[20]

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[17] Such concepts as territorial waters, continental shelf and the deep seabed designated as the common heritage of mankind.
[18] notes 8, 9, supra.
[19] note 5, supra.
[20] K.J. Holsti, "A New International Politics? Diplomacy in Complex Interdependence" (1978) 32 Inter'l Orgn., 513 at 514.

With such attitudes, cooperation or international interdependence is attractive only on paper. Moreover, principles of national sovereignty and international equity and fairness are not always reconcilable. Thus, for most African coastal states, assured control over resources *per se* may not be enough, since most of them have to depend on the developed world for technological assistance. Such reliance may effectively relinquish whatever control or sovereignty they may have in respect of these resources.

Establishment of dispute-settling procedures as provided for in the convention may not always help to iron out such strongly held differences. At best they provide a more or less permissive framework within which states can solve their differences. Part fifteen and Annex five of the 1982 Convention, dealing with dispute settlements reveal the flaws of such an international arbitral system. Upon close examination, it will be realised that most of the provisions rely on the good will of the states involved and a great deal of discretion is given them. Again this illustrates perhaps the biggest drawback of international law - the lack of an effective system of enforcement.

V. CHAPTER FOUR

A. THE FISHERY RESOURCES OF THE OCEANS

The fishery resources of the oceans have been and still are an important source of food for mankind. Through various archeological findings, there is evidence that the early Phoenicians and Carthaginians relied on Mediterranean fisheries and even in the Middle Ages, the importance of fisheries was crucial.[1] For mankind in the twentieth century, fish from the ocean still offers a great potential in the quest for food. This is evidenced not only by the tremendous increase in global marine fisheries catch, but also by the increase in fisheries disputes, such as the ongoing controversy between Canada and France over fishing rights and quotas on the Canadian East Coast, fishing quotas and preferential rights among members of the European Economic Community. Between 1975 and 1980 alone, marine fisheries catch increased from 59,171,200 to 64,576,200 metric tonnes, an average annual increase of approximately one million metric tonnes. However, the African catch of the world's total tonnage is relatively minimal. With the exception of Algeria, Morocco and Mauritania, the contribution of most African states in the world fishing index is virtually negligible. Ocean fishing is nevertheless an important aspect of the economic life of almost all of the coastal African states, either by way of employment, as a nutritional supplement or as a significant contributor to the Gross Domestic Product. Thus, the need to enhance the role of fisheries in contributing to national economic, social and nutritional goals received widespread support and agreement, particularly by the African delegates at the World Conference on Fisheries Management and Development, held under the auspices of the Food and Agriculture Organization in Rome in June, 1984.[2]

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[1] For a historical analysis of the influence of fishing in the development of the Law of the Sea, see Fulton, The Sovereignty of the Seas. (1911), pp. 165-246., 338-517.

An important feature of marine fisheries, however, is allocation, the latter not being uniform throughout the ocean and being dependent largely on varying biological and geographical conditions in the waters.[3] It is in fact estimated that most of the ocean is a virtual desert in terms of fish production, particularly in the tropics.[4] In addition, most of the important species, the pelagic, demersal and crustaceans are found above or on the continental shelf,[5] and since the continent as a whole is disadvantaged as far as the shelf is concerned, fishing could be very crucial.[6] In the Atlantic ocean for example, which washes the western coast of the continent, the shelf is very narrow with an average width of just about thirty nautical miles, although there are several areas where the shelf stretches seawards more than a hundred nautical miles, as for example off the coasts of Senegal and Sierra Leone. Further, the hydrological features of the waters, such as the relative calm or steadiness of the coastal surface waters, are sometimes not conducive to fish production. The richest fishing grounds are normally found in areas of seasonal upwellings of nutrient-rich ocean waters, which occur most prominently in the north and south temperate zones.[7] Thus, there are significant fish populations off the desert coasts where these upwellings occur and where, incidentally the human population is sparse and therefore (with the notable exception of Morocco and Senegal) local fish demands are relatively very low. Along the Ivorian, Ghanaian and Nigerian coasts, fishery resources are relatively poor while the population and demand for fish are very high.[8]

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[2] F.A.O., Report of the F.A.O. World Conference on Fisheries Management and Development. (1984) Rome. This conference was attended by delegates from forty-three African states.

[3] A.D. Couper, "The Economic Geography of the Sea." in D.M. Johnston (ed.) Marine Policy and the Coastal Community (1976) Croom Helm, London, pp. 37-63.

[4] ibid. See also Cuyvers, Ocean Uses and Their Regulation. (1984). p. 27, D. Bardonnet *et. al*., "Les états de l'Afrique de l'ouest et le Droit International des Pêches Maritimes." (1973) Ann. Fr. Tome 19, 837 at 883-84.

[5] Bardonnet *et al*., *loc. cit*., See also M.W. Mouton, The Continental Shelf. (1952) Martinus Nijhoff, p. 55. The concept of the shelf is discussed in greater detail below.

[6] See L.M. Alexander, "Indices of National Interests in the

There are basically two important fishing zones off the West Coast of Africa: the East Central Atlantic Fishery (normally called the CECAF) zone which stretches from

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[6] (cont'd) Oceans." (1973) I ODILA pp. 21-49; A.D. Couper, The Law of the Sea (1978) MacMillan Educ. Ltd., p. 7, fig. 3.

[7] J.A. Crutchfield, R. Lawson, West African Marine Fisheries: Alternatives for Management (1974) R.F.F. Washington, D.C., p. 1, Cuyvers, *loc. cit.*, note 5, supra.

[8] Crutchfield *et al*., op. cit. p. 30, Bardonnet *et al*., loc. cit., note 4 supra. P.S. Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third Conference." (1979) 7 ODILA, p. 95.

Morocco right down to Guinea and covers the Gulf of Guinea down to Cameroun and, the South-east Atlantic (normally called the ICSEAF) zone stretching from the Angolan coast right down to the South-African tip.[9] Although a major portion of the fishery resources of this area lies within territorial waters, there are considerable resources outside these national zones, where in accordance with the principle of freedom of the high seas, long-range fishing vessels from other nations may operate freely and profitably. There is in fact evidence that the extensive fishing activities of fleets from the Soviet Union, Japan, Spain and South Africa are exerting undue pressures on coastal fishing with a consequent real and actual danger of overfishing. This phenomenon largely explains the various anarchic and multilateral extensions of territorial seas. These various claims have been fully documented elsewhere[10] and need no elaboration here.

On the Eastern coast of the continent the situation is pretty much the same. In Madagascar, Tanzania and Mozambique, the subsistence fishing industry has to compete with foreign fishing vessels in the Indian Ocean and, on the whole, the East African countries take far less than their 'fair share' of the fisheries here. [11] This state of affairs is due partly to the activities of large distant-water fishing vessels, as well as to certain geographical conditions of the area. Along the East African coast, not unlike the west coast, the continental shelf is very narrow, although the region has a significant number of reefs and coral outcrops which make crustaceans an important fishery resource. Mozambique and Madagascar, for example, are important producers of crustaceans mainly for export, with production undertaken by joint ventures with foreign fishing companies. There is also a significant absence of zones of upwelling along the East African coasts, and the East African Current which washes the coast is notably deficient in nutrients. Consequently, plankton growth is very low and the chain of marine food is greatly affected.[12] Thus, despite the fact that the region is endowed with large numbers of species of fish, these do not occur in sufficient concentrations to make the fishing enterprise reasonably and economically feasible.[13]

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[9] Crutchfield *et al.*, op. cit., figure 1., E.O. Bayagona, "Alternative Legal and Economic Arrangements for the Fishery of West Africa." in L.M. Alexander, (ed.), The Law of the Sea: Needs and Interests of Developing Countries (1974) Univ. of Rhode Island, Kingston, pp. 107-9.

[10] Bardonnet *et al.* op. cit., pp. 842-862.

[11] A.R. Tussing, Fisheries of the Indian Oceans (1974) RFF: Washington, D.C., p. 50 J-Claude Douence, "Droit de la Mer

At present, most of the African states in the Atlantic region are expanding their fleets[14] and are thus very much concerned with control over management as well as conservation of their fishery. This is particularly

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[11] (cont'd) et développement économique sur la Côte occidentale d'Afrique." (1967) 38 RGDIP 110, 117, E. Peyroux, "Les états africains face aux questions actuelles du droit de la mer." (1974) 78 RGDIP., 623-4.

[12] A.S. Msangi *et. al*., International Conference on Marine Resources Development in Eastern Africa. (1974) Univ. of Dar es Salaam, Tanzania., pp. 15-17.

[13] ibid.

[14] Ghana, Algeria, Cameroun, Nigeria, Côte d'Ivoire, Senegal, Mauritania.

important in order to avoid the potential depletion of these resources by the time that they have acquired the basic infrastructure and adequate skills to engage in large-scale marine fishing. As has been correctly observed,

> [f]actory ships...have been blamed for the depletion of stocks in many parts of the world including the highly productive waters off the northwest coast of Africa as well as in the North Atlantic. Thus, factory ships as well as long distant trawlers present(ed) a clear danger to the survival of coastal marine resources....[15]

It is quite clear therefore that at least until the mid seventies, the opportunities for coastal communities to manage their fisheries were greatly restrained since many, if not most of the commercial stocks lay beyond the narrow limits of territorial waters and as such subject to the traditional doctrine of *mare liberum*.

B. LEGAL REGIME OF FISHERY REGULATION

The international regulation of the marine fishing industry has had a chequered history. Ever since the time of Grotius right until the mid-twentieth century, the prevalent doctrine of *mare liberum* was based on the assumption that the resources, particularly of the high seas, were inexhaustible and that it was impossible for any nation or individual to subject vast submarine areas or the high seas to its sole control. Thus, the international law rule concerning the exploitation of fishery resources was largely one of unregulated competition among nations and fishermen. But this basic assumption of inexhaustibility has long become anachronistic,[16] and the very nature of the life cycle of fish and their extreme mobilty add a new dimension to the application of this principle, not to mention increasing environmental hazards to fish life in the oceans. By the mid-twentieth century, there was a proliferation of bilateral and multilateral fishery agreements most of which were designed mainly to regulate particular species. However, the pace for this development had been set as far back as 1818 following the settlement of the fishery question between Great Britain and the United States[17] In 1882, six European powers ventured to regulate fishing by adopting the North Sea Fisheries Convention[18] signed at the Hague.

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[15] M.H. Glantz, "Man State and Fisheries: Societal Constraints." (1986) 17 ODILA, p. at 201-2.

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[16] F. Newton, op. cit., chap 3 note 14,supra.

[17] The Anglo-American Convention of Commerce (Fishery off Newfoundland) 1818 6 BFSP 3.

[18] International Convention for the Purpose of Regulating the Police of the Fisheries in the North Sea outside Territorial Waters, signed by Great Britain, Germany, France, Belgium, Denmark and the Netherlands. See Fulton, p. 637, 73 BFSP 39. See also, the Canadian-American North Pacific Agreements to regulate halibut fishery, (1925) 4 UST 3982-84; The Great Lakes Fishery Agreements, (1940) U.S. Executive Agreement Series, No. 182. Probably the starting point of fishery regulation is the Anglo-Dutch herring fishery disputes leading up to the three Dutch wars. See Fulton, op. cit., pp. 378-516, 604-49. See further, W.M. Chapman, "The Theory and Practice of International Fishery Management." (1970) 7 San Diego L. Rev. 408-455 for a modern account, see also, A.P. Daggett, "The Regulation of Maritime Fishery by Treaty. (1934) 28 AJIL. 693.

Thus, as a corollary of the real or perceived exhaustibility of fisheries and the negation of the basic element in the classical doctrine of freedom of the seas, emerged the principle of conservation. This conservational aspect[19] which has received universal support is now a necessary part of the traditional doctrine of freedom, as the 1958 Convention on Fishing and Conservation of the resources of the High Seas[20] clearly states in Article 1:

> 1. All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this convention, and (c) to the provisions contained in the following articles concerning conservation of the living rsources of the high seas.
>
> 2. All States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 2 elaborates on the meaning and ambit of conservation as being the aggregate of measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products, with a view primarily to securing a supply of food for human consumption. Thus, this objective is basically aimed at providing a recurring long-term source of food from the ocean based on the renewability of fishery resources, in effect achieving a maximum sustainable yield, the level where the loss to the stock from fishing and natural mortality is balanced by the increase from reproduction. At this level, the same quantity of fish can be caught yearly without adversely affecting the total size of the stock, *ceteris paribus*. For many years, this was the only goal sought in international fishery management, but this has had inherent difficulties and has often been criticised.[21]

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[19] It has been suggested that the idea of conservation was being practiced in England as far back as 1278. See M. Graham, Concepts of Conservation (1955) Papers, U.N. Doc. A/Conf. 10/7. However, this may not have been the basis of English fishery policy in the seventeenth century, for as Fulton suggests "the argument that national power and wealth depended on the sea fisheries became a common place in the seventeenth century, and was urged as a reason why the English people should secure for themselves the fisheries in their own seas. This, it was said would do more good to the Kingdom than all the mines and the whole trade in cloth and wool..." Fulton, op. cit., p. 135.

[20] 559 UNTS, 285, in force March 20, 1966.

For purposes of international agreements, this was a particularly safe concept because it was relatively easy to arrive at this level without going through a labyrinth of economic concepts. Being based on the physical measure of actual catch of fish, the issue of conflicting values among different countries was also avoided and probably the most important aspect of this concept, amid its obvious deficiencies, is the fact that it emerged just at the time it was most needed to resolve many fishery problems. This concept has now outlived its usefulness in the eighties when other objectives have been brought into sharp perspective, such as those of a more equitable allocation of catches between states and the avoidance of conflict between fishing and other uses of the sea.

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[21] S. Cunningham *et.al* Fisheries Economics, An Introduction (1985) St. Martin's Press, New York, pp. 98-100. See also, J.A. Crutchfield, The The Fisheries' Problems in Resource Management. (1965) Univ. of Washington Press, pp. 43-56.

Apart from the jurisdictional aspect, which will be discussed below, the management objective adopted under the 1982 Law of the Sea convention is really one of a modified maximum sustainable yield. Articles 61 and 62 deal with the conservation and utilization of the living resources of the exclusive economic zone, which primarily charge the coastal states with all measures to be taken in this regard. Accordingly, Art. 61 (2)(3) charges the coastal state to ensure that the living resources of the zone are not endangered by over-exploitation through the adoption of "proper conservation and management measures" which measures "shall be designed to maintain and restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors." In terms of utilization, Art. 62 (1) stipulates in a rather general manner that "the coastal state shall promote the objective of optimum utilization of the living resources of the economic zone," but without prejudice to article 61. Thus, by adding the rider, "without prejudice," much of the force behind "shall promote" is diluted. On the whole, the new regime, obviously with the aim of redistributing fish catches in favour of coastal states, has put fishery management almost entirely within the domain of the coastal states. This is in fact what the

African states wanted at the Conference. The rationale behind the new regime is to provide a framework within which improved management schemes based on limited entry can be developed to deal with specific problems, for the benefit of coastal communities. But this move towards a nationally-based resource management may in fact yield negative results, because national management or control per se does not guarantee success, neither does it necessarily increase level of welfare in society.[22] In fact it has been argued that such a regime fails to establish a coherent basis for practical management regulations particularly in areas where multi-species catches are normal, or where adjacent coastal states arrive at conflicting decisions concerning the total allowable catch (TAC).[23] The coastal state under article 62 (2) is entitled to determine its capacity to harvest the living resources of the economic zone with advice from appropriate bodies where relevant, and then to determine the amount of surplus and who will be allowed entry to exploit such surplus if any. These provisions seem to give a lot of discretion to African coastal states, for they can easily adjust their 'allowable catch' upwards or downwards as they please, but the crucial point here *is* how they are going to use this to their benefit. The record so far of most African states in this regard points to a rather bleak future. African states in order to take greater advantage of the new regime would have to set their priorities right. The need for cooperation particularly in the CECAF zone, where numerous fish stocks intermingle and migrate during their life cycle through the waters of several different states, cannot be overemphasized. Any management schemes developed should also take account of the needs of the local communities and artisan fishermen[24] and their nutritional requirements. According to a recent survey of the West African region,[25] there are two regional organizations[26] currently engaged in planning for fisheries development aimed at increasing artisanal production; promoting the processing and exports of fish products; and gradually replacing foreign with local vessels in the economic zone.[27] In this regard, also, attention may be drawn to the report of the 1984 F.A.O. World Conference on Fisheries,[28] and the eight-point strategy adopted for fisheries management and development.

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[22] P. Dasgupta, The Control of Resources. (1983) Oxford: Basil Blackwood. p. 29.

[23] Cunningham *et al*. op. cit., p. 201. The total allowable catch (TAC) refers to the level set by a coastal state in respect of the individual fish stocks in its coastal waters whereby the exploitation of the fisheries does not drastically affect the sustainable yield, ie. the level of catch which under constant environmental conditions neither decreases nor increases the fish population.

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[24] E. Vercruijsse, *The Penetration of Capitalism, A West African Case Study*. (1984) Zed Books Ltd., England, pp. 69-74, 131-141; A. Crutchfield *et al*., *op. cit*., note 7., pp. 30-8, J.G. Sutinen, R.B. Pollnac, H.P. Tosserend, *The Fisheries of West Africa and Prospects for Development* (1981) Kingston, Rhodes Island, Centre for Marine Resource Development.

[25] E. Gold, C.L. Mitchell *et al*., *The Implementation of the New Law of the Sea in West Africa*. (1985) Dalhousie Ocean Studies Programme. Halifax.

[26] East Central Atlantic Fishery Committee, CECAF; Economic Community of West African States, ECOWAS.

[27] E. Gold, *et al*., *op. cit*., note 25, p. 105.

[28] See note 2, *supra*.

Among the points included were: the contribution of fisheries to national economic and social and nutritional goals; and the special role and needs of small-scale fisheries and rural fishing and fish-farming communities.[29]

C. JURISDICTIONAL FRAMEWORK

The geographical rules evolved for determining who has jurisdiction over what resources and where, basically constitute the foundation for an international legal framework, and have long lasting implication for fishery management. It is in fact the main method for allocation of the resources of the oceans. In discussing these various geographical limits however, it must be noted that fish have migratory patterns and may not normally obey man-made boundaries. For purposes of fishery allocation, two geographical concepts are significant, the baselines and the exclusive economic zone. As a matter of fact, the latter constitutes the most significant contribution by the African states at the Third Conference on the Law of the Sea.

BASELINES

Over the past decade, African coastal states have unilaterally extended their maritime sovereignty seaward to safeguard their economic interests in the living resources adjacent to their coasts. One method deployed by these states has been the use of baselines.[30] A baseline, as used in law of the sea discussions is a technical term signifying a line drawn on a large-scale chart, joining all the low-water marks along the coasts of a state, for the purpose of measuring the breadth of the territorial sea.[31] By use of beacons, this line is traced on land or sea. However, the low water marks along a coast are not always so easy to determine, especially in areas where there are ports or deep indentations, or even a coastal fringe of islands or reefs. The problem with such highly irregular and unstable coastlines with respect to the drawing of baselines came up in the Anglo-Norwegian Fisheries Case.[32] The World Court, having regard to the peculiarities of the Norwegian coast, held that the Norwegian straight baseline system was in accordance with international law. It rejected the contention of the United Kingdom that by using straight baselines, Norway appropriated a vast area of the high seas as its internal waters, and emphasized that the straight baseline has a geometrical construction which had been used by several states without objection, and noted that since 1869 when Norway begun applying the system of straight baselines, there had been no objection by the United Kingdom until 1933. Although upholding the validity of Norway's actions, the court observed that

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[29] ibid., pp. 13-15, 20-22.
[30] Bardonnet *et al.*, op. cit. note 4, p. 542.

> (t)he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in

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[31] 1982, LOSC. Article 5.
[32] ICJ Reports, 1951, p. 116.

> its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.[33]

Thus, the court laid down certain conditions governing the drawing of such baselines. First, they must be drawn so as not to depart to any appreciable extent from the general direction of the coast; and secondly, the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.[34]. The court also pointed out that in drawing the lines joining various points on the coast, it is always legitimate to take into account 'certain economic aspects peculiar to the region, the reality and importance of which are clearly evidenced by long usage.'[35]

This decision was a tremendous influence on the work of the International Law Commission prior to the 1958 Geneva Conference on the Law of the Sea. The views expressed in the decision were incorporated in the Geneva Convention on the Territorial Sea and Contiguous Zone.[36] Article 4 (1)-(6) express almost verbatim the decision of the court:

> 4 (1) In localities where the coast line is deeply indented or cut into, or if there is a fringe of islands...the method of straight baselines...may be employed in drawing the baseline from which

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[33] ibid., p. 132.
[34] ibid
[35] ibid.
[36] 516 UNTS 204, NDI, p. 1.

> the breadth of the territorial sea is measured.
>
> 4 (2) ...[s]uch baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the line must be sufficiently closely linked to the land domain.
>
> 4 (4) Account may be taken, in determining particular baselines of the economic interests peculiar to the region concerned.

The various discussions and debates at the Conference largely ignored this delimitational aspect which seemed then to have been satisfactorily settled. In any case the crucial issue then was the breadth of the territorial sea and not its delimitation. At the third conference the above provisions and the customary law as evidenced by state practice were reviewed by a small working group of experts. The final outcome of the Conference, the convention of 1982, details provisions in articles 5 to 14 relating to baselines. These provisions largely restate the already existing customary and conventional rules, with, only slight modifications. Thus, article 3 maintains the low-water line as the normal baseline. Article 7 contains elaborate provisions regarding the use of straight baselines, which provisions are largely a restatement of article 4 of the 1958 Convention. However, article 7 (2) is significant in that it allows for an extension of the low-water line further seaward. It states that in deltaic areas or where natural conditions make the coastline highly unstable, appropriate points for drawing a straight baseline may be selected along the furthest seaward extent of the low-water line regardless of a subsequent regression of the low-water line. Thus, in deltaic and highly irregular coastal areas the baseline of a coastal state may not conform to the actual low-water line at any particular time. This could very well be evident along most African coasts, where some rivers which flow directly into the sea may dry up or decrease in volume due to drought or other natural causes, thus changing the low-water line. Generally, however, the African coastline is relatively straight[37] and presumably the drawing of baselines should not be that problematic. Nevertheless, there are regional issues which could raise problems. Article 7 (5) of the 1982 Convention which states that economic interests peculiar to the region concerned must be considered when drawing baselines, requires that the reality and importance of these must be clearly evidenced by long usage. What the phrase means is not quite clear. Is it for the benefit of the coastal state or for other states which have by usage acquired certain rights therein? In the Norwegian case, it was easy because there was evidence of long usage since 1869 until 1933. However, when one considers that many of the coastal states in Africa, which may be claiming the benefit of this section, are new and do not have sixty-six years of state practice or usage behind them, the utility of the section becomes questionable. This is particularly so in the situation where coastal states wanting to exclude distant fishermen from a particular fishery may use the straight baseline to include vast areas in their internal waters. Although the economic interests may be peculiar and obvious, their reality and importance may not be evidenced by long usage.

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[37] Rembe, Africa and the International Law of the Sea. (1980)p.95.

The use of baselines for the determination of the exclusive economic zone and ultimately the high seas, should not be ignored. Most African states have drafted municipal legislation determining their baselines. A few countries have specific points for the drawing of their baselines in these legislations,[38] others merely give a vague reference to 'appropriate baselines'[39] while most of them refer to the low water mark as being the baseline.[40] Four countries in the West African region, Guinea, Guinea-Bissau, Mauritania and Senegal use the straight baseline system. Most others prefer a combination of the normal and the straight baseline system, thus giving them a great deal of flexibility, as the Sudanese Territorial and Continental Shelf Act (1970) indicates. See 6 (1) lays down seven elaborate methods of drawing the baseline for measuring the territorial waters, combining all of the methods in articles 5 through 13 of the 1982 Convention. It is significant to note that most of the wealth of fishery in this region is concentrated along these coastlines, between latitudes 10°N and 36°N normally considered as the North Temperate Zone.[41] In a recent dispute between Guinea and Guinea-Bissau resolved by an arbitral tribunal on March 6, 1986[42] the view was expressed that

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[38] See for example, Guinea-Bissau, Law No. 3/78 of 19 May 1978. Art. 1, United Nations, *The Law of the Sea National Legislation on the EEZ, Economic Zone and the Exclusive Fishery Zone* (1986) N.Y. Sales No. E 85.V.10, p. 121. Kenya Presidential Proclamation of 28 February 1979, para. 1, *ibid*, p. 170, Seychelles Maritime Zones Act. (1977) *ibid*., p. 275.

[39] See Senegal, Fishery Code (1976) *ibid*., p. 260, Madagascar Ordinance No. 73-060 of 28 Sept. 1973, Morocco Act No. 1-81 of 1980, Art. 1, Angola, Decree No. 12-1A/80, Art. 1.

[40] Ghana, Territorial Waters and Continental Shelf Act. (1973) Article 1 (1), Nigeria, Territorial Waters (Amendment) Decree, (1971) Art. 1, Sudan, Territorial Waters and Continental Shelf Act, (1970) Chapters II, Sec. 6.

> the problem of the baselines necessary to establish...the exclusive economic zone...depend on the unilateral decision of the states concerned.[43]

Admittedly, the issue before the tribunal was the lateral delimitation of the Continental Shelf between two adjacent states, however it is submitted that the respective baselines claimed by the two states could considerably affect or influence their maritime boundary delimitation, and on that score the tribunal failed to give adequate consideration to the matter. Consequently, the observation made by the International Court of Justice in the Anglo-Norwegian Fisheries Case[44] on the international character of sea area delimitation must be emphasized. As between Guinea and Guinea-Bissau, however, the dispute concerning the delimitation of their maritime boundary has now been settled, although both parties have maintained their straight baselines as provided in their respective municipal legislation.[45] On the other side of the continent in the Indian Ocean, Tanzania and Kenya, two adjacent states have also aimed at an agreement regarding their territorial waters boundary,[46] whereby a detailed description of beacons from which their baselines were to be drawn is given. In any event, it is expedient for those African coastal states likely to have delimitation problems to resolve them once and for all in order to avoid long legal battles and arbitration which may well affect third party rights,[47] and stunt or hinder development. Article 14 of the 1982 Convention allows for a combination of several methods to arrive at a satisfactory baseline, this provision must be utilized to resolve any regional differences which may emerge. Besides such official baselines must be reviewed from time to time because erosion, desposition and even emplacement of man-made structures may bring about changes in the baseline.

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[41] Crutchfield *et al.*, op. cit., note 7, figure I.
[42] Text of this award is reproduced in 1986, Vol. 25 ILM, p. 251.
[43] ibid., para. 76.
[44] See text accompanying note 33, supra.

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[45] Guinea, Decree No. 336/PRG of 30 July 1980, Guinea-Bissau, Law No. 3/78 of 19 May 1978. See note 38, supra.

[46] See Exchange of Notes Between the United Republic of Tanzania and Kenya Concerning the Delimitation of the Territorial Waters Boundary Between the Two States, reproduced in S.P. Jagota, Maritime Boundary. (1985) Martinus Nijhoff, p. 353.

[47] The Guinea/Guinea-Bissau dispute was triggered off by speculation that the contested area might contain petroleum in commercial quantities, and oil companies to which exploration rights had been granted were reluctant to operate in a disputed area, consequently both parties recognized that a final resolution of the dispute would be in their best interest.

THE EXCLUSIVE ECONOMIC ZONE

In view of the highly migratory nature of fisheries and the general threat posed to coastal fishery resources, extensions of national jurisdiction seawards to encompass vast areas of the seas seemed to be the only means of ensuring local control over the management, conservation and use of marine fishery resources for most coastal states. By 1982 when the convention was finally adopted, most African coastal states had already established exclusive fishery zones to the edge of the continental shelf and even beyond.[48] As far as the fishery resources of the coastal states are concerned therefore, the most important geographical limit is the exclusive economic zone, in whatever form the concept is couched. As a conventional rule of international law, this concept has not been formally validated, since the convention which gives it legal validity and identity is not yet in force. A certain consistent trend, however, can be deduced from the practice of states toward the creation of a customary international norm.

Development of international law rules through custom is a valid law-creating process, the results of which are generally regarded as being binding upon all nations, a notion which derives force from article 38 (1) of the Statute of the International Court of Justice.[49] To constitute custom there must be a general and consistent practice of states, preponderant though not necessarily universal[50] evidenced by its acceptance by states as law. This latter is an important constitutive element of customary international law referred to in technical terms as the *opinio juris sive necessitatis* recognized by the Permanent Court of International Justice in the Lotus Case[51] and the International Court of Justice in the Asylum Case.[52] The existence of *opinio juris* in state practice must be proved by inductive reasoning. As the ICJ expressed in the North Sea Continental Shelf Case, to constitute *opinio juris*,

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[48] E. Peyroux. note 11 supra.

[49] Art. 38 (1), The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :inter alia,international

> two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it...The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[53]

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[49] (cont'd) custom,as evidence of a general practice accepted as law. All members of the United Nations are parties to the Statute of the Court per article 93 of the U.N. Charter.

[50] See The Asylum Case. (1950) ICJ Rep. 266, at p. 336. See also, A.A. d'Amato, The Concept of Custom in International Law. (1974) Cornell Univ. Press, New York. pp. 223-235.

[51] The SS Lotus (1927) PCIJ Reports, Sec. A., No. 10. p. 28.

[52] See note 50 *supra*

[53] Judgement ICJ Rep. 1969, p. 3 at 44. See also, d'Amato, op. cit. pp. 47-102.

It is also not necessary to prove that the practice has been followed for any particular length of time, although the presence or absence of protest could actually be an important factor in the formulation of *opinio juris sive necessitatis*.[54] Thus the establishment of the existence of a principle of customary international law can be drawn from various sources such as state papers, diplomatic notes, treaties, works of international legal bodies, decisions of international and national tribunals, as well as the writings of international legal authorities.[55] From most of these sources, there is evidence that most countries now claim an exclusive fishery or economic zone of about two hundred nautical miles.[56]

The notion of an exclusive fisheries zone, however, is not new, having been discussed at the 1958 and 1960 Conferences on the Law of the Sea. This is evident from the proceedings of the International Law Commission prior to the 1958 Conference, although the Commission could not develop a definite concept. In its report to the General Assembly in 1951, the view was expressed that

> the existing law on the subject (of fisheries conservation) including the existing international agreements do not provide adequate protection of

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[54] See for example, Lauterpacht, "Sovereignty over Submarine Areas." (1950) 27 BYBIL 376.

[55] C.J. Colombos, The International Law of the Sea. (1967), sec.. 6.

[56] See Fisheries Jurisdiction Case, Judgement. 1974, ICJ Rep. 175, 191-2. See also, K.L. Walz *et al*. "United States Jurisdiction Over the 200 Mile Maritime Zone." (1986) 23 San Diego L.Rev. p.545.

marine fauna against extinction.[57]

The Commission chose to deal with the issue in terms of conservation of the living resources rather than the exploitation rights of a coastal state, hence the Convention on Fishing and Conservation of the Living Resources of the High Seas.[58] This Convention basically required states parties thereto to agree upon measures to conserve the fishery resources of the high seas, although in certain very limited circumstances a coastal state was given the right unilaterally to adopt conservation measures for areas of the high seas adjacent to its territorial seas.[59] This convention came into force in 1966, but by 31 December 1985 had received only 36 ratifications. That it has largely remained a dead letter is evidenced by the unilateral extensions of fishery jurisdiction by states.

The Second Conference on the Law of the Sea in 1960 was specifically mandated to resolve the outstanding problem of exclusive fishing rights, but that conference was a complete failure.

Notwithstanding the failure of these two Geneva Conferences to resolve the fisheries jurisdiction problem, their work marked significant milestones in the evolution of the concept of the exclusive economic zone. Contrary to the general impression[60] that the concept originated with the extensions by African states of their territorial sea limits, the seeds of this doctrine were embedded in the 1952 Santiago declaration on the Maritime Zone.[61] By this instrument, the Governments of Chile, Equador and Peru declared as a principle of their international maritime policy, that each of them possessed sole sovereignty and jurisdiction over the area of sea adjacent to its coast and extending not less than two hundred nautical miles therefrom including the seabed and subsoil thereof.[62] Subsequent state practice by Latin American and Carribean states, often disdained by the maritime powers as being an infringement on the principle of freedom of the seas[63] were indeed claims to an exclusive economic zone as the concept was propounded at the third conference.[64] Although couched in stringent terms of patrimonial sea, these Latin American claims have had considerable contemporary impact. In 1970, a year before the Organisation of African Unity (OAU) adopted its Resolution on Territorial Waters,[65] nine Latin American states - Argentina, Brazil, Equador, El Salvador, Nicaragua, Panama, Peru and Uruguay - all of whom had already extended their sovereignty seawards to a distance of two hundred miles, adopted the Montevideo Declaration on the Law of the Sea.[66] One of the six basic principles of this instrument was the right of every state "to establish the limits of its maritime sovereignty and jurisdiction in accordance with its geographical and geological characteristics and with the factors governing the existence of marine resources and the need for their national utilization."[67] In 1971, the Council of Ministers of the O.A.U. during its seventeenth session strongly supported

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[57] ILC Yearbook, (1953) Vol. II, p. 218.
[58] 559 UNTS 285, ND I 353.
[59] ibid art. 7.
[60] See for example, P.S. Ferreira, note 8 supra. p. 102.

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[61] Reproduced in NDI. p. 23.

[62] ibid. Chile, Peru and Costa Rica had in fact proclaimed sovereignty over a belt of sea extending 200 miles from their national coasts, claims which were then contested by the United States, but which were in essence claims to an exclusive economic zone. See L.C. Green, "The Continental Shelf." (1951) CLP 54 at 74.

[63] For example McDougal and Burke, op. cit., pp. 562-3 where they vehemently oppose the idea of expanding the territorial sea, arguing that "it has not in fact been demonstrated that an expansion of the territorial sea will serve any realistic exclusive interest of particular states...(and) that the important objectives of increased fish production and a more profitable fishing industry would be better served by increased international cooperation, and the dangers to both the realistic exclusive interest and the inclusive interest of states which inhere in an expansion of territorial sea seem both evident and certain."

[64] For an analysis of these claims see, D.M. Johnston, *et al*. "The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends." (1973) Occassional Papers #17 Law of the Sea Institute, Rhode Island.

> the extension of fisheries jurisdiction up to the limits of the continental shelf by African states and confirmed the inalienable rights of the African countries over the fishery resources of the continental shelf surrounding Africa.[68]

The important point to note here is that these various claims to maritime sovereignty are not empty manifestations of sovereignty or independence by the new states. A more realistic way to look at these is to examine the rationale, as the representative of Kenya explained:

> the exclusive economic zone is an attempt at

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[65] See S. Oda, The International Law of Ocean Development: Basic Documents. (1972) London, Vol. I, p. 363.
[66] ibid, pp. 347-8, Vol. 9. ILM 1081.
[67] ibid
[68] note 65 supra.

> creating a framework to resolve the conflict of interests between the developed and developing countries in the utilization of the sea,...an attempt to formulate a new jurisdictional basis which will ensure a fair balance between the coastal states and users of the neighbouring waters.[69]

Thus, it is really a kind of protection, an equitable principle for benefit of the new states of the world who are emerging from the throes of colonialism.

It is therefore not surprising that the concept was endorsed by most African states. At a regional seminar on the Law of the Sea held at Yaounde in 1972, seventeen African coastal states recommended *inter alia*, a twelve-mile territorial sea beyond which could be established an economic zone wherein coastal states will have an exclusive jurisdiction for the purpose of control, regulation and national exploitation of the living resources of the sea as well as the prevention and control of pollution. Although the resources of this zone would be reserved for the primary benefit of the coastal states, freedom of navigation, overflight and laying of submarine cables and pipelines would be preserved, and access would be granted to the landlocked and geographically disadvantaged states of the region for the purpose of exploitation of the living resources of the zone. The results of this seminar[70] formed the basis of the 'best drafted' version of the economic zone

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[69] AALCC, Report of the 13th Session. (1972). p. 6.
[70] UN Doc. A/AC. 138/79.

- the Kenyan Draft[71] submitted to the conference. It must be emphasized that this new principle of the law of the sea, unlike that of *mare liberum* is not based on purely legal principles, but more on moral, economic, political and scientific grounds.

In fact, some have considered it as a necessary rectification of international law as the OAU Resolution on Fisheries stated in a preambular paragraph,

> considering that international law recognizes the sovereignty of states over the natural resources of the subsoil of the continental shelf,...the extension of such sovereignty to cover living resources constitutes a justifiable rectification of international law.[72]

As already stated above, the concept of an exclusive economic zone is steadily becoming a part of customary international law, by the continuing practice of states.[73] Further the compromise on which there was consensus at the end of the conference to a large extent accomodated the interests of different groups of countries. The notion therefore that this concept is fundamentally handicapped by the lack of signatures of important industrialised countries is wholly untenable.[74] It is further urged that this new concept should be seen as part of a general effort by African countries to harness national resources for the total advancement of their peoples. It is within this framework that the exclusive economic zone is here discussed as a fishery zone.

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[71] UN Doc. A/CONF. 62/C.2/L.82, A/AC. 138. SC II. L10.
[72] OAU Doc. CM/Res. 250(XVII), reproduced in Oda, op. cit., p. 362.
[73] E.E.E. Mtango, F. Weiss, "The Exclusive Economic Zone: Considerations of a Developing Country." (1984) 14 ODILA. 1-54. See also K.L. Walz, *et. al*., op. cit.
[74] See text to note 56 supra.

The most significant aspect of this whole concept is that it changes the status of waters which had hitherto been high seas, and gives it a national character. The effect is that about ninety percent of the world's commercially exploitable fish stocks are now under national control or management. The modalities for exercising this newly-acquired jurisdiction are laid down in part five of the Convention. Most African states have indeed enacted national legislations on the exclusive economic zone along the lines of the provisions of the convention, therefore it is not out of place to discuss them.

Article 56 gives the coastal state "sovereign rights" for certain specified purposes within a sea belt adjacent to its coast and not extending beyond 200 nautical miles from the baseline from which the territorial sea is measured. These include *inter alia*:

a) sovereign rights for exploring, exploiting, conserving and managing all national resources, whether living or non-living in the seabed, subsoil and superjacent waters.

However, in exercising these rights, a coastal state shall have due regard to the rights and duties of other states as set out in article 58. These rights are basically the traditional freedoms of the high seas,[75] with the exception of the freedom of fishing. Thus, although under the regime of the exclusive economic zone, the coastal state is considered the sole custodian of the maritime area extending up to two hundred nautical miles from its baseline, the exclusivity of these rights is limited by the continued existence of the rights of other states. Moreover the nature of these custodial rights has been specified and consequently any activity of the coastal state in this zone falling outside the purview of article 56 will be inconsistent with the convention which gives the regime its legal validity and will therefore be illegal. This seems to be a neatly tailored legal argument, but its accuracy depends on the exact legal obligation created by the conventional regime. In the next section it will be shown that although specific provisions apparently create legal obligations for coastal states and rights for other geographically disadvantaged and landlocked states, the extent and nature of these obligations and rights are based to a large extent on the discretion of the coastal state. Consequently, the obligations, rights or duties to be discussed in connection with the exclusive economic zone may defy such abstract jurisprudential analysis as the Hohfeldian theory or any other.[76]

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[75] Articles 87, 88-115 of 1982 Convention.

[76] W.N. Hohfeld, Fundamental Legal Conceptions as Applied in Legal Resources. (1978) New Haven: Yale Univ. Press. See further, R. Dworkin, Taking Rights Seriously. (1977) London

D. COASTAL STATE JURISDICTION OVER LIVING RESOURCES

The control and jurisdiction given to the coastal state in respect of the conservation and management of the living resources of the exclusive economic zone (hereinafter, EEZ) entail certain responsibilities. Article 61 (1) (2) gives the coastal state the right to determine the total allowable catch (TAC) of its zone, taking into account the best scientific evidence available to it, in order to maintain proper conservation and management measures to prevent the danger of overexploitation. In making such determinations, a coastal state must also ensure that the species within the zone are managed so as to facilitate the maximum sustainable yield (MSY) of such species. Article 61 (5) allows for the contribution and exchange on a regular basis of scientific information concerning catch, fishing effort statistics and any other data relevant to the conservation of fish stock.

This can be done through competent international organizations, subregional, regional or even global.

Having in effect given the coastal state the sole discretion to determine its total allowable and conservation measures, the convention in article 62 requires it to promote the objective optimum utilization of the living resources. Exactly how objective a coastal state can be when it makes these determinations, is difficult to determine. Succeeding sections do not help in clarifying the matter. According to article 62 (2), a coastal state shall determine

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[76] (cont'd) Chpts. 6 & 7.

its own capacity to harvest the whole of its total allowable catch. Where it is not able to harvest all of the entire allowable catch, then it is required to permit fishermen of other states to fish for the balance or surplus. Generally, a coastal state may insist on its capacity to harvest the whole of its allowable catch only where its marine resources are limited and there is actual overexploitation. Otherwise, there is always a motivation for some level of foreign fishing in the EEZ of a coastal state. In fact where a coastal state declares a surplus, it is faced with the problem of allocating this surplus. Article 62 (3) lists certain relevant factors which the state must consider in allocating the surplus, including *inter alia*:

a. the significance of the living resources of the area to its own economy;

b. its other national interests;

c. the requirements of developing states in the subregion or region in harvesting part of the surplus;

d. the need to minimize economic dislocation in states whose nationals have habitually fished in those waters;

e. the interests of states whose nationals have made substantial contributions and efforts in research and identification of stocks.

While this broad framework tends to leave the coastal state with a wide discretion as to who will have access to how much of the surplus,[77] such access if granted will be subject to such conditions as the coastal state may prescribe, *inter alia* : the granting of licences; observation of coastal state conservation measures; training of coastal state personnel and undertaking research programmes. All of these conditions are designed to help a coastal state promote the development of its own fishing industry as well as to keep a close eye on the activities of foreign fleets in its EEZ.

E. ALLOCATION

Probably the mode of allocation of resources of the EEZ is the most important issue facing the coastal state. The convention merely gives guidelines but the ultimate decision is that of the state.

Allocation involves the determination of how and by whom the fishery resources are to be harvested, processed and marketed.

At present, it is not economically feasible for most African states to reserve the living resources of their EEZ's exclusively for their nationals. First, the fishing industry in most coastal states in Africa is artisanal and such a policy would lead to under-utilization. Secondly, it is not easy for a single coastal state to determine independently its allowable catch.[78] Consequently, the national fishery policy will always have an international aspect, and any approach which fails to take into account the intertwined interests of African states of a particular region will only lead to chaos. Thus, the need for cooperation and joint action of states in a particular region is important. However, the conventional provisions to this effect are at best permissive. Article 62 (2) (3) provides for the conclusion of "agreements or other arrangements" to promote the realization of an objective utilization of the living resources. Thus, African states, in a true spirit of cooperation may have to enter into agreements in respect of the geographical allocation of the living resources as well as to determine their respective regional shares. In the West African region, this has taken the form of negotiated maritime boundaries,[79] such as those between Senegal and Guinea-Bissau, and Gambia and Senegal. Once the geographical allocation as between states is determined, the national allocation system can also be determined.

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[77] With the exception of their obligation to give priority to developing landlocked and geographically disadvantaged states of the region.

[78] F.A.O., "Principles and Problems in Determining Allowable

Most African states have national fishery legislation establishing a licensing system whereby permits are granted to local fishing enterprises. The Fisheries Act, 1977 of Gambia[80] provides for such a system, and also establishes a

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[78] (cont'd) Catches" in FAO Fisheries Report 206, Supplement I. See also "Principles of Determining Allowable Catches with Particular Reference to Shared Resources." ibid., pp. 44-46.

[79] E. Gold, C.L. Mitchell *et al*. op. cit. note 25 supra., pp. 41-46.

[80] note 45 supra. p. 103.

scheme to promote small scale fishery industries and cooperative enterprises. It also empowers the Minister responsible for fisheries to consult with governments of other states in the region with a view to harmonization and coordination of their respective fisheries management and development plans. Senegal, Angola, Kenya, Ghana, and Nigeria all have the licensing system. In terms of the allocation of the allowable catch which the coastal state is capable of harvesting, such a licensing scheme may be appropriate. In fact, for local ventures, such a scheme may even promote the development of the artisanal fishing industry. However, as far as the surplus is concerned and in respect of foreign operators, this may not be beneficial. The Gambian Legislation for example, subjects foreign operators to the same scheme, with only slight modification as to the species of fish, type of fishing gear and the method of fishing.[81] The main problem with such a scheme is that very often licensing fees do not correspond to the actual value of resources taken and this could mean an effective and voluntary surrender of permanent sovereignty. Moreover, a breach of any condition of the license can only be redressed by the local remedies provided for in the Act. In the case of Gambia for example, this could be a cancellation of the permit or a fine. If the rationale for allowing foreign participation is to promote development and foster growth, then it is submitted that such remedies are not enough.

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[81] ibid. Sec. 21-23.

A proper system of allocating surplus would be to create specific legal obligations for the foreign operators, and to have an effective means of enforcing such obligations. A number of African states like Angola and Guinea-Bissau have entered into joint-ventures and other bilateral agreements, either with governments or undertakings of developed countries to carry on harvesting, technical and capital development as well as management functions.[82] Through such joint ventures, they are able to tie the fishing rights granted to specific assistance programs such as development and modernization of boats; training of fishermen and personnel involved in vessel maintenance; development of port facilities, processing and marketing operations; and even a supply of a specified amount of fish for local consumption. Such joint-ventures, however, are not without problems. There could be a real danger of abuse in the absence of adequate safeguards and vigilance on the part of the coastal state. Thus, these ventures should be viewed only as a necessary means to estabishing independent fishing enterprises in the African states concerned.

A suggestion has been made[83] that in a true sense of equity and sharing, African states could establish multinational joint ventures *inter se*, thereby pooling their meagre resources to achieve an objective optimum utilization for the benefit of all. Such an idea seems to be implicit in the Agreement reached by the Frontline States of Southern Africa at Arusha in July, 1979 which recognized that:

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[82] S.E. Carroz *et al*. "The New International Law of Fisheries Emerging from Bilateral Agreements." (1975) Marine Policy. p. 79; "Bilateral Fishing Agreements" (1978) FAO Fisheries. Circular No. 709, FID/C. 709, April 1978.

[83] H.S. Kibola, "Africa and the Exclusive Economic Zone." (1986) 16 ODILA. p. 369 at 378.

> Fishing requires joint action to create uniform economic zones, uniform regulation of foreign fleets and the establishment of a valid convention concerning the Indian and Atlantic ocean waters from the equator south...cooperation (especially if landlocked states want to participate) in joint research institutions, quota allocation, crew training, distribution system and perhaps catching and processing firms are potentially significant and merit case by case study.[84]

Such cooperation initiatives at the regional level are present in West Africa - by way of intraregional reciprocal or non-reciprocal agreements, often containing supplementary provisions for cooperation between parties in various sectors connected with the fisheries.[85]

F. RIGHTS OF LANDLOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES

Most of the landlocked countries of Africa rank among the least-developed nations of the world.[86] Quite apart from this, the continent also has a fair share of geographically disadvantaged states, in all aspects of the term. Cameroon, Ghana and Côte d'Ivoire for example have been described as geographically disadvantaged under article 70 (2), since they are dependent for the satisfaction of their nutritional needs on the exploitation of the living resources of the economic zones of other states of the region.[87] There are others who can claim no economic zone of their own because of their geographical situation or the nature of their coastlines, such as Cameroon, Ethiopia, Gambia, Sudan and Zaire.

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[84] See quoted in Mtango, *et al*. op. cit. note 94. pp. 38-9.
[85] See notes 80 & 82 supra.
[86] See, Alexander and Hodgson, "The Role of Geographically Disadvantaged States." op. cit.

In view of the nature of the jurisdiction of a coastal state in its exclusive economic zone as discussed above, it is of interest to examine the exact nature of the rights granted to the landlocked and geographically disadvantaged states in respect of the living resources of the EEZs of the region or subregion under articles 69 and 70 of the Convention. This is important because at the very outset, the OAU in its declaration on Issues of the Law of the Sea[88] proposed that:

> in order that the resources of the region may benefit all peoples therein...the landlocked and other disadvantaged countries are entitled, to share in the exploitation of living resources of neighbouring economic zones on an equal basis as

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[87] ibid. Table 8.

[88] UN Doc. A/CONF. 62/33. Off. Rec. UNCLOS III, Vol. III, p. 63. OA U Doc. CM/Res. 289 (XIX).

> nationals of coastal states on bases of African solidarity and under such regional or bilateral agreements as may be worked out.[89]

Coastal states, although agreeing in principle with the above proposal, nevertheless had certain reservations. Consequently in the Yaounde Conclusions, it was recognized that 'the exploitiation of the living resources within the economic zone shall be open to landlocked and near landlocked states, provided only that the enterprises of these states desiring to exploit these resurces are effectively controlled by African capital and personnel.'[90] The Kenyan Draft Articles on the EEZ reiterated this condition.[91]

The disadvantaged and landlocked states (especially the latter) were very much concerned about the coastal states' attitudes regarding the EEZ, and they submitted far-reaching proposals regarding the exploitation of the resources of the zone. The Kampala Declaration[92] claimed, *inter alia*, equal rights and jurisdiction with coastal states in respect of all resources beyond the territorial sea, and further declared that any rights they had over those resources shall be maintained. At another level, African landlocked states advocated the establishment of regional exclusive economic zones open to exploitation by all states of the region through regional agencies. Evidently, there was a clash of interests between the coastal states on the one hand and the disadvantaged and landlocked states on the other, over the exploitation of the resources of the EEZ.[93] Articles 69 and 70 of the convention purport to reconcile these differences objectively, by providing for access by these states _to an appropriate part of the surplus of the living resources_ in this zone _on an equitable basis_.

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[89] ibid. sec. c. para. 9.

[90] Conclusions of African States Regional Seminar on the Law of the Sea, Yaounde. (1972). See note 70 supra.

[91] See note 71 supra.

[92] U.N. Doc. A/CONF. 62/23.

In allocating the surplus of its zone, a coastal state shall in accordance with article 62 (3) take into account the provisions of articles 69 and 70, and shall determine the terms and modalities of such participation through bilateral, sub-regional or regional agreements.

Although the Convention does not define "an appropriate part" it gives certain criteria or conditions which may be used in making such determinations. Articles 69 (2) and 70 (3) list these as:

a. the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state;

b. the extent to which the (disadvantaged state) is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of the living resources of the EEZs of other coastal states;

c. the extent to which other (disadvantaged states) are participating in the exploitation of the living resources of the EEZ of the coastal state and the consequent need to avoid a particular burden for any single coastal state or a part of it;

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[93] Rembe, note 37 _supra_ pp. 142-150.

d. the nutritional needs of the populations of the respective states.

In addition, article 71 absolutely precludes the applicability of articles 69 and 70 in the case of a coastal state whose economy is overwhelmingly dependent on the exploitation of the living resources of its EEZ.

In the light of the above, one can only appreciate the real legal significance of the rights granted under articles 69 and 70 to landlocked and geographically disadvantaged states by examining the extent to which they can be enforced or realized.

An aggrieved party may challenge the decision of a coastal state under these conventional provisions, either in an international dispute settlement forum in accordance with articles 2 (3) and 33 (1) of the United Nations Charter, or under Part Fifteen of the 1982 Convention. Before resorting to the former, however, it is expected that a state might take advantage of these conventional provisions on the assumption that these create much more specific and binding obligations.

Article 297 (3) (a) of the Convention provides that any dispute relating to the interpretation or application of the provisions of the convention regarding fisheries may be settled in accordance with section two of Part Fifteen regarding compulsory dispute settlement procedures entailing binding decisions. However, the coastal state is "not obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management laws and regulations."[94] However, paragraph 3 (b) of the same article enables an aggrieved state to submit any dispute to a Conciliation Commission established under Annex V, Section 2 when it is alleged that:

> "a coastal state has arbitrarily refused to allocate to any state under articles 62, 69 and 70, and under the terms and conditions established by the coastal state consistent with this convention, the whole or part of the surplus it has declared to exist."

Such a conciliation commission shall hear the parties, examine their respective claims and objections and make proposals to them, with a view to reaching an amicable settlement.[95] However, the report of the commission, including its conclusions on all questions of fact or law relevant to the matter in dispute as well as its recommendations, for an amicable settlement, shall not be binding upon the parties,[96] and in no case, shall the conciliation commission substitute its discretion for that of the coastal state.[97]

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[94] Art. 297 (3) (a) of 1982 Convention.

[95] Annex V, Article 6.

In effect, the coastal state enjoys complete discretion, even in so far as the determination of these matters are concerned.

What other recourse then, does an aggrieved landlocked or geographically disadvantaged state have? Article 300 of the Convention incorporates, for what it is worth, the well-established principles of good faith and abuse of rights by stating that:

> "states parties shall fulfil in good faith the obligations assumed under (the) Convention and shall exercise the rights, jurisdiction and freedoms recognised therein in a manner which would not constitute an abuse of right."

The notion of an abuse of right, however, does not seem so attractive, and international judicial opinions have not been sympathetic to it. In the Case of The Electricity Company of Sofia and Bulgaria, (Preliminary Objection)[98] for example, Judge Anzilotti in a separate opinion stated that:

> "the theory of abuse of rights is an extremely delicate one and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the court. The old rule, a rule in

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[96] ibid. Art. 7.
[97] Art. 297 (3) (2).
[98] [1939] PCIJ Ser. A/B No. 77.

> such complete harmony with the spirit of international law, *qui iure suo utitur neminem loedit*, would seem peculiarly applicable. The Bulgarian government was entitled to denounce the treaty and was sole judge of the expediency or necessity of doing so."[99]

Earlier, the Permanent Court of International Justice had made a similar observation in the case of Certain German Interests in Polish Upper Silesia[100] by stating that the misuse or abuse of sovereign rights cannot be presumed and it rests on the party who alleges that there has been such misuse to prove it.[101]

Probably, the best hope for the landlocked and disadvantaged states who have lost almost everything in an area which has traditionally been part of the high seas, is that coastal states in discharging their duties and obligations under the convention will do so in good faith, as the principle has been frequently affirmed by the International Court.[102] For, as the International Law Association's Committee on Landlocked States stated in its report at the 1980 Belgrade Conference, where...the contest is likely to be between two states arguing about a delicate balance of rights and duties affecting vital aspects of sovereignty, the issue is unlikely to be presented in terms such as to invite application of the doctrine of abuse of rights.[103]

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[99] ibid. p. 98.

[100] [1926] PCIJ Ser. A No. 7.

[101] ibid p. 30. See also Lauterpacht, The Development of International Law by the International Court. (1958) New York, Praeger. pp. 163-4.

[102] See Conditions of Admission to Membership of the United Nations. [1948] ICJ Reports. 63. See also, Rights of Nationals of the United States of America in Morocco. [1952] ICJ Reports 212, where the court stated that although the power of evaluating import goods for customs purposes rested solely within the competence of customs authority, "it is a power which must be exercised reasonably and in good faith."

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[103] Report of the 59th Conference Belgrade. p. 321.

VI. CHAPTER FIVE

A. HYDROCARBONS

The offshore occurrence of hydrocarbons is directly related to the width of the continental margin and shelf.[1] Although there are other important sub-surface minerals such as bedded salts, potash and phosphorites within this area of the seabed, for most African states, the oil and gas deposits are the most significant.

The African continent itself stands on a plateau which in many parts is abruptly truncated seawards, consequently, the continental shelf in most areas is relatively narrow, although there are relatively wide shelves around the islands of Mauritius and Madagascar, as well as Namibia and the Gulf of Guinea.[2] Even then, possessing a wide shelf does not necessarily guarantee any potential for oil and gas because the hydrocarbon-bearing potential of a particular shelf depends on the thickness and nature of the sedimentary formation in the area. Some shelves are in fact devoid of resources due to the environmental and geological conditions. Moreover, even when the resources exist, they must be technically accessible and their extraction, commercially feasible.

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[1] D.M. Leipziger *et al*., Seabed Mineral Resources and the Economic Interests of Developing Countries. (1976) Ballinger Pub. Co. p. 2. fig. 1-1.

[2] Rembe, Africa and the International Law of the Sea. (1980) p. 104.

Since the oil price boom of 1973-74 however, Africa has emerged as one of the most promising new exploration areas in the world, although according to World Bank statistics this potential may not be too promising in terms of per capita income. According to these estimates,[3] the potential for ultimate recoverable reserves range from medium, low to none at all. Only Libya is considered as having a high potential production capacity. For most states listed in the medium potential category[4] offshore explorations and drillings are in progress. Between 1975 and 1979, the top twenty international oil groups picked up 1.8 million square kilometres of new exploration acreage in Africa, a figure equal to more than 50 percent of the exploration permits awarded throughout the world during the same period.[5] Most of these were offshore, and competition for attractive concessions between leading oil companies is always a potential fuelling ground for territorial disputes, onshore as well as offshore, as evidenced by recent and current territorial imbroglios.

As a matter of fact, such was the reason for the Guinea/ Guinea-Bissau maritime boundary arbitration of 1985[6] This dispute was triggered by the speculation that the contested area might contain petroleum in commercial quantities, and since both governments had granted exploration rights to oil companies, a final resolution of the dispute was seen on both sides as a necessary condition for exploration. The Tunisia-Libya dispute over the Gulf of Gabes which resulted in the World Court decision in 1983[7] laying down principles and rules of international law to be applied in boundary delimitation between adjacent states,, is typical of such oil-fueled territorial disputes. Both countries had granted offshore concessions for petroleum exploration and production. However, with no existing agreement delimiting their respective maritime boundaries, and with the overlap of claims between the respective licensees and concessionaires, the ensuing dispute was submitted by special agreement between Libya and Tunisia to the World Court in 1977.[8] All over the continent, there are seeds of potential confrontation relating to offshore hydrocarbons[9] and other resources.

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[3] note 1 supra. pp. 23-30. Table 1-5.

[4] Angola, Cameroon, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Ghana, Guinea, Madagascar, Mauritania, Morocco, Mozambique, Nigeria, Senegal, Tanzania and Tunisia.

[5] Africa Confidential. Vol. 22. No. 23. p. 6.

[6] (1986) 25 ILM 250.

According to a United Nations Report on the economic significance, in terms of sea-bed mineral resources, of the various limits proposed for national jurisdiction,[10] the proposed national limit of two hundred nautical miles or three thousand metres (comprising the continental shelf and some slope) will result in an increase in the petroleum production potential of the landward national area. This means that with an exclusive economic zone wherein the coastal state has sovereign rights, for the exploitation of both living and non-living resources, the regime of the continental shelf as a resource zone would be superfluous. By emphatically linking the resources of the shelf with those of the superjacent waters of the exclusive economic zone, most African coastal states at the Conference advocated a comprehensive functional zone rather than separate regimes. As one delegate noted:

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[7] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya. ICJ Report, 1982, p. 18.
[8] ibid. pp.35-36.
[9] For example disputes are brewing between Nigeria and Cameroon, Equitorial Guinea and Gabon, Senegal and Guinea-Bissau. See also note 5 supra. pp. 6-7.
[10] U.N. Doc. A/AC. 138/87, June 1973, GAOR, 28th Sess. Supp. No. 21 (A/9021).

> a 200-mile economic zone, if established would in practice, not differ from the concept of the continental shelf. The rights of a coastal state over the exploration and exploitation of the resources within the relevant economic zone would necessarily cover the mineral resources of the continental shelf which henceforth should be delimited in accordance with the criteria of distance and not that of exploitability, since the latter as provided for in the 1958 Convention was clearly inadequate and too vague in view of daily improvements in technological possibilities for exploitation.[11]

At the regional level, the concern was linked to the delimitational aspects of the shelf and not with the regime as a resource zone.[12]

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[11] Statement of Zaire, Official Records, UNCLOS III, Vol. II, p. 146, para. 1.

[12] The OAU did not submit any draft proposals on the shelf as such and neither did the conclusions of the Regional Seminar

African state practice, however, definitely endorses an established principle of customary international law, presenting very little, if any, controversy that a coastal state enjoys certain rights over its continental shelf, which constitutes a natural prolongation of its land territory into and under the sea. These rights, as stated in the North Sea Continental Shelf Case[13] exist

> *ipso facto* and *ab initio*, by virtue of sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[14]

B. THE CONTINENTAL SHELF

Although the Truman Proclamation of 1945 is generally regarded as most instrumental in the development of the continental shelf doctrine, a legal basis for it had already been established. Opinions and statements of publicists well before the twentieth century already indicated a certain trend towards a justification of the coastal state exercising control over parts of the seabed adjacent to its shores, but beyond the traditional three-mile territorial sea.[15] Most of these however were linked to the existence of

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[12] (cont'd) at Yaounde address this issue.
[13] [1969] ICJ Rep. 3.
[14] ibid. p. 23.
[15] See notes 106 and 102. Chpt. one.

sedentary fisheries, as Fulton indicated:

> sedentary animals connected with the bottom, such as oysters, pearl-oysters and coral, which are found in shallow water as a rule, and usually near the coast...are looked upon as belonging to the soil or bed of the sea than to the sea itself. This is recognized in municipal law, and international law also recognizes in certain cases a claim to such fisheries when they extend along the soil under the sea beyond the territorial limit. These pearl fisheries are very valuable and have been treated from time immemorial by successive rulers of the Island [of Ceylon, now Sri Lanka] as subjects of property and jurisdiction.[16]

The often quoted rhetoric of de Vattel,

> who can doubt that the Pearl Fisheries of Bahrein and Ceylon may be lawful objects of ownership?[17]

to support a nascent shelf doctrine well before the twentieth century is said to be based on a misconception. The main objection being that such references to sedentary fisheries were mere exceptions to the general rule of *mare liberum*. With regard to submarine minerals and their mining by way of tunnelling, the same objection is made,[18] and their relevance to the formulation of a nascent shelf doctrine is denied.

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[16] Fulton, op. cit. pp. 696-7.
[17] Vattel, Droit de Gens. (1758) BK. I, Chap. 23. Sec. 287. (1916) Carnegie Transl. p. 107.
[18] McDougal and Burke, op. cit. pp. 635-6 Newton, "Inexhaustibility..." op. cit. 418-20.

In any case, by the time of the Truman Proclamation, it was generally admitted that a limited portion of the bed of the open sea was capable of occupation by individual states for well-defined purposes, and entitled to recognition by other states.[19] Consequently, the twentieth century doctrine of the continental shelf is, in a sense, really a modern expression, giving form and content to an all-pervading consideration of the law of the sea, namely the basic relevance of geography to legal boundary definition. However, the discovery of minerals after the devastation of World War II gave the continental shelf a new and important dimension which considerably downplayed its connection to fisheries.

Thus, the preamble to the Truman Proclamations for example recognizes the longrange world-wide need for new sources of petroleum and other minerals and emphasizes that efforts to discover and make available new supplies should be encouraged. Whilst competent experts were of the opinion that such resources underlie many parts of the continental shelf,modern technological progress is gradually making their utilization practicable. Consequently, the exercise of jurisdiction over these natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just. In addition, the shelf itself may be regarded as an extension of the landmass of the coastal nation and the resources found therein/or frequently form a seaward extension of a pool of deposits lying within the territory.

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[19] C. Hurst, "Whose is the bed of the sea?" (1923-24) BYBIL. 43.

By 1950, the spate of national proclamation decrees and other instruments relating to the submarine areas had made the continental shelf doctrine an important topic for discussion in various international fori. At its fourty-fourth conference in Copenhagen, the International Law Association recognized that:

> the doctrine according to which control and jurisdiction over the seabed and subsoil of the continental shelf outside territorial waters can be acquired without effective occupation but by a proclamation on the part of the coastal state has in the past few years been widely acted upon...and it evidently satisfies a need for the development of international law on the subject.[20]

In its report on the Regime of the High Seas, the International Law Commission made a similar observation, that the fact that an ever-increasing number of states are claiming rights to the continental shelf shows the very real need that exists for restricting the freedom of the seas.[21]

THE JURIDICAL NATURE OF THE CONTINENTAL SHELF

The nature of the legal rights enjoyed by a littoral state in respect of the submarine areas is quite different from that of the territorial sea. The "sovereign rights" of the coastal state in this area are limited to the exploration and exploitation of the resources therein. Both the 1958 Convention on the Continental Shelf and article 77 of the 1982 Convention emphasize this. These rights are said to be exclusive in the sense that if the coastal state does not undertake the exploration or exploitation of these resources, then no one may do so without the express consent of the littoral authority. Furthermore such "sovereign rights" are not dependent on occupation, effecttive or national, or on any express proclamation.

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[20] I.L.A., Report of 44th Conference (1950) p. 127.
[21] U.N.Doc A/CN.4/17

These seemingly innocuous legal provisions raise interesting jurisprudential questions : is the shelf then, a part of the territory of the coastal state to which its municipal laws apply automatically, and/or what are the parameters of the coastal state's legislative competence in this maritime zone? These questions defy definite answers, and one must look to state practice. Some countries have asserted unqualified sovereignty over their continental shelf in their relevant national legislation,[22] whilst others unequivocally include the continental shelf within their public domain. The Ghanaian Act of 1973[23] for example declares that:

> the continental shelf is vested in the Head of State

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[22] See for example Seychelles Maritime Zones Act. (1977) ST/LEG/SER. B/16. Art. 5(2) which states that Seychelles has and always had full and exclusive sovereign rights in respect of the continental shelf.

[23] Territorial Waters and Continental Shelf Decree. (1973) NRCD 165. ST/LEG/SER. B/16.

> on behalf of the Republic in trust for the people of Ghana,...the continental shelf (refers to) the seabed and subsoil of the submarine areas to a depth of one hundred fathoms contiguous to the coast and seaward of the area of land beneath the territorial waters of the Republic, and further parts lying beyond...whose natural resources are capable of exploitation (which natural resources), include minerals and other organic or inorganic matter.[24]

Benin,[25] Côte d'Ivoire,[26] Senegal[27] and Togo[28] have similar legislation defining their rights to explore and exploit the resources of the shelf.

The ambiguity surrounding the definition of the legal nature of the "sovereign rights" of the coastal state over the continental shelf has been incorporated in almost all national legislations. The Maritime Zones Act (1977) of Seychelles provides a typical example: according to section 3(1), the sovereignty of Seychelles extends and has always extended to the territorial waters of Seychelles and to the seabed and subsoil underlying, and the air space over such waters; but section 5(2) merely states that Seychelles has and always had, full and exclusive sovereign rights in respect of the continental shelf.[29] Are the "sovereign rights" in section 5(2) different then, from the

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[24] ibid. sec. 5.
[25] ST/LEG/SER. B/15, p. 62.
[26] ibid. p.95.
[27] ibid. p.431.
[28] ibid. p.441.
[29] ST/LEG/SER. B/19. pp. 102-3.

"sovereignty" in section 3(1), especially when the former are said to be "full and exclusive"?[30]

Cases concerned with the continental shelf have not adequately addressed this issue even though it is important, particularly since under customary international law this area was considered a part of the high seas until the mid-forties. The North Sea Continental Shelf Case for example merely recognized the "inherent right" of the coastal state over the "natural prolongation of its landmass" as existing *ipso facto* and *ab initio* by virtue of its sovereignty over the land,[31] but gave no practical consequences of the existence of these rights. Strictly speaking, however, there is a theoretical limit to the practical application of a coastal state's laws to cover every conceivable activity on the shelf, precisely because these so-called "sovereign rights" are basically tied to the exploitation of natural resources found in or on the shelf. Outside of this, the continental shelf area is in strict law, extraterritorial.

Some European and Commonwealth state practice however, indicates otherwise: whilst some European countries like France and Denmark have extended their criminal laws apparently *in toto* to regulate activities on the shelf, various Commonwealth nations like Malta, Ireland, Bahamas and Tongas have incoporated section 7 of the 1878

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[30] See L.C. Green, "The Continental Shelf" (1951) 4 CLP 54.
[31] note 13 , supra.

Territorial Waters Jurisdiction Act[32] in the legislations respecting the shelf.[33]

For most African states, their municipal legislation on mining activities is equally applicable to the offshore area of the continental shelf,[34] thus obviating any distinction between "sovereign rights" and sovereignty as far as the continental shelf is concerned. Article 78 of the 1982 Convention, largely reiterating the 1958 provisions, states that:

1. the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters;
2. the exercise of the rights of the coastal state over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states.

These rights and freedoms include *inter alia* the laying of submarine cables and pipelines, but does not include any kind of drilling, which according to article 81 belongs excusively to the coastal state. For most African coastal states, since their continental shelves are almost coterminous with their exclusive economic zones, [35] that regime, as well as article 78, will apply.

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[32] See O'Connell, The International Law of the Sea. (1982). Vol. I, pp. 96-7, 485. The Act of 1878 was passed as a result of the case of the Franconia (1876) 2 Ex. D. 63, which held that the English Courts had no jurisdiction to hear criminal and tort cases when the offence was committed on board a foreign ship not more than three miles from thee English coasts.

[33] O'Connell, op. cit. pp. 484-6.

[34] See for example, Nigeria: Mineral Oil Act, 1959, Petroleum Decree No. 51 of 1969; Tanzania: Mining Law, Rev. Laws, Vol. X, Ch. 399; Kenya: Mining Ordinance, Ch. 306.

THE DELIMITATION OF THE CONTINENTAL SHELF

A more troubled aspect of the continental shelf doctrine has been its seaward extent, which the 1958 Convention left unresolved. Article 1 defines the shelf as referring to:

a. the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea to a depth of two hundred metres or,

b. beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources thereof.

These articles reflect the urgent concern at the time to control mineral extraction on the seabed, which was then thought to be technologically possible or feasible only to a depth of two hundred metres, as well as the possibility in the remote future of carrying such exploitation beyond the two hundred metre isobath.[36] The latter was largely due to the influence of the nineteen Latin American States and the United States of America through their resolution at the Cuidad Trujillo Conference on the Conservation of Natural Resources, the Continental Shelf and Territorial Waters in 1956, which stated that:

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[35] E. Gold, C. L. Mitchell *et. al.*, The Implementation of the New Law of the Sea *op.cit.* p. 37.

[36] International Law Commission Yearbook, 1950, Vol. I. p. 219

> the sea-bed and subsoil of the continental shelf,...adjacent to the coastal state, outside of the territorial sea and to a depth of two hundred metres or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources...appertain exclusively to that state and are subject to its jurisdiction and control.[37]

According to an expert, the inclusion of the exploitability criteria was:

> designed to place all coastal states on an equal footing with respect to the submarine areas adjacent to their respective territories (since),...[t]he geographical configuration of the bed of sea contiguous to the coasts of continents and islands is sometimes so irregular that it cannot be defined in terms of the shelf or terrace concepts.[38]

Unfortunately, this criterion made the seaward limits of an already difficult geophysical concept dangerously obscure, since this limit became directly dependent on the level of technology that each state had. Thus, only the few states who could exploit these resources could thereby acquire sovereignty. For those who did not possess the requisite technology, sovereign rights in these areas were purely academic.

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[37] F.V. Garcia-Amador, The Exploitation and Conservation of the Resources of the Sea. (1963) Leyden, p. 10.
[38] ibid. p. 108.

At the third conference on the law of the sea, the African position as advocated by the O.A.U. was for a regime that would place a precise limit on the seaward extent of the shelf and replace the vague exploitability criterion. For them, the adoption of a two hundred mile economic zone embracing both the living and non-living resources therein would obscure the continental shelf and make the concept redundant.[39] Such a regime would serve the dual purpose of rectifying the anomaly in the 1958 Convention as well as laying down a precise seaward limit for that part of the seabed designated as the common heritage of mankind.

The 1982 Convention, whilst doing away with the vague exploitability criterion has replaced it with complex geologically-based methods for determining the seaward limits of the shelf.

Article 76 provides that the outer limit of the shelf "either shall not exceed 350 nautical miles from the baseline from which the breadth of the territorial sea is measured, or shall not exceed 100 nautical miles from the 2500 metre isobath." The continental shelf of a coastal state shall therefore not extend beyond the continental margin, which "comprises the submerged prolongation of the landmass of the coastal state and consists of the seabed, subsoil of the shelf, slope and the rise (but) does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." The outer limit of the continental shelf of most African states can, by reason of the geophysical nature of the continent itself, be easily defined, and most of them may not have to go through the maze of complex geological criteria outlined in Article 76. This is because the African continent stands on a plateau with the shelf truncated a few miles off the coast. Thus it is expected that their shelves will be coextensive with their exclusive economic zones, that is to say the two hundred nautical mile limit.[40]

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[39] Rembe, op. cit. p. 105.

C. OPPOSITE AND ADJACENT STATES

There are potential boundary problems as far as these states are concerned and almost all African coastal states are either adjacent or opposite each other. This problem which was dealt with in the 1958 Convention, was also a controversial one at the third conference. According to article 6 of the 1958 Convention, the delimitation of the continental shelf between the adjacent states shall be determined by agreement, but failing that, and unless another boundary is justified by special circumstances, the boundary line shall be the equidistance line measured from the same baselines as the territorial sea. The customary law on the matter, as stated by the International Court is that the

> delimitation is to be effected by agreement in accordance with equitable principles, and taking

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[40] note 35 supra. Table 2.

> account of all the relevant circumstances in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea without encroachment on the natural prolongation of the land territory of the other;[41]

and that

> the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect.[42]

The difficulties and dangers in laying down a stringent conventional approach led the third Conference to adopt a simple method which, according to article 83 of the 1982 Convention, is to be "effected by agreement on the basis of international law as referred to in article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution". Where agreement is not possible, then the matter is to be referred to the dispute settlement procedure under part fifteen of the Convention unless there is a special treaty in force between the states concerned which covers the matter. In such a case the matter is to be settled according to the provisions of such Treaty. Since this provision is exactly the same as article 74 on the exclusive economic zone, it seems to reinforce the earlier suggestion that this regime will govern the continental shelf of most African states.

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[41] [1969] ICJ Rep. 3. para. 101, C. (1).
[42] ibid. para. 46.

Both Guinea and Guinea-Bissau[43] for example, agreed in their submissions to the arbitral tribunal, that their respective maritime territories (the territorial sea, the exclusive economic zone and the continental shelf) must be delimited by a single line. Such a line does not necessarily have to be equidistant. It was in fact observed in the Tunisia-Libya Continental Shelf Case, that "treaty practice as well as the history of article 83 of the Draft Convention on the Law of the Sea leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed...since the principle was neither mandatory nor had any privileged status in relation to other methods."[44]

The Arbitral tribunal in the Guinea-Guinea-Bissau dispute also observed that "the equidistance method is just one among many...and there is no obligation to use it or give it priority even though it is recognized as having a certain intrinsic value because of its scientific characters and the relative ease with which it can be applied."[45] In the tribunal's opinion, the very purpose of the delimitation precludes any recourse to a method chosen beforehand and requires objective legal reasoning to arrive at an equitable result.[46] The two recently concluded maritime boundary negotiations in the African region[47] emphasize the point that it is very difficult to devise a universal rule or formula that would cover the varied geomorphological configuration of shelves. Consequently each situation can only be resolved on its own peculiar circumstances, and the economic considerations of any particular coastal state cannot be a decisive factor.[48]

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[43] (1986) Vol.25 I.L.M. .
[44] See note 37 supra para. 109-110.
[45] note 43 supra. para. 102.
[46] ibid.

It is therefore suggested that, for those opposite and/or adjacent states whose continental shelf resources may overlap, for example an oil reserve which straddles the boundary line, there should be a negotiated agreement for joint exploitation.[49] This could well be the only economically feasible method to make optimal use of such a resource.

D. DEEP SEABED RESOURCES

During the preparations for the 1958 Geneva Conference on the Law of the Sea, the International Law Commission expressed the view that any rules governing the exploitation of deep sea-bed minerals were not necessary since the technology for such exploitation did not exist and was not likely to, for some considerable time.[50] Some members though had enough foresight then to advance proposals for the internationalization of the seabed, most of which were actually proposed as part of reforming the law of the sea.[51] Thus, Professor Spiropolous of Greece proposed the establishment of a High Seas Board to manage the resources of the sea,[52] while Professor Scelle of France suggested the establishment of an international administrative authority within the framework of the United Nations to control the uses and resources of the seabed and subsoil of the high seas.[53]

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[47] The Tunisia/Libya judgement and the Guinea/Guinea-Bissau Arbitration.

[48] See for example note 7 supra. para. 107, and note 43 supra, para. 121-3.

[49] As for example, agreements between Norway and the United Kingdom concerning the Frigg Gas Field in the North Sea, ND. V, p. 398; 1977 UKTS 113; The Japan-South Korea Agreement concerning the area south of the Korean Strait (1974) ND IV, p. 117. The latter in fact allows a single concessionaire to exploit the resources on behalf of both states.

There are extensive marine mineral resources beyond the continental shelf which occur in either subsurface or surficial deposits,[54] not to mention the seawater itself which contains enormous amounts of gaseous and mineral solutions as well as animal and plant organisms. The subsurface deposits included bedded salts such as those occurring in the shelf and slope areas of Africa, the Middle East, Europe and the Gulf of Mexico: coal, iron, phosphorites and other metallic minerals. However, the surficial deposits are by far the most interesting and important from an immediate economic standpoint, particularly the manganese nodules which are widely distributed in the Pacific, Atlantic and Indian Oceans. These are black to brown coloured hydrous manganese dioxide concentrations containing small amounts of copper, nickel, cobalt molybdenum, zinc and a variety of other metallic elements.[55]

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[50] ILC Yearbook. (1956) Vol. II, p. 9.

[51] See for example, Slouka, "United Nations and the Deep Ocean: From Data to Norms." (1972) Syracruse Jour. of Inter'l Law and Commerce. pp. 61-69. G.W. Haight, "Law of the Sea Conference - Why paralysis?" (1977) 8 JMLC. p. 281 at 282-3.

[52] ILC Yearbook. (1951) Vol. I, p. 304, para. 16.

[53] Ibid. He was particularly concerned that the Continental Shelf Doctrine could be stretched to violate the traditional freedom of the high seas.

[54] Marine Mineral Resources Beyond the Continental Shelf. UN Doc. E/4449/Add. I, pp. 6-8.

The presence of these nodules on the deep sea floor was first reported by the Challenger Expedition of 1872-76, and since then five hundred locations on the ocean floor have been recorded. For the past two decades, these nodules have received a great deal of attention not only because of the component minerals, but also due to the fact that they are within immediate reach of technological exploitation. Moreover these marine deposits occur in greater quantities than the landbased ones, and their formation is continuous[56] thus making production costs considerably lower. Ocean mining therefore is considered strategically and economically important for the developed states who are, as yet, the sole users of these minerals.

African states' interests in deep seabed mining are diametrically opposed to those of the developed and technically advanced states. It may be recalled that similar discoveries on land, a little over a century ago, had resulted in a scramble and seizure which in turn led to colonization and the many problems associated therewith. With the memories of such a scramble still fresh and its consequences still present, African states see themselves (and rightly so) not as beneficiaries of yet another scramble for the earth's last frontier, but again as the victims or losers. Seabed mining, if unregulated, will definitely increase supplies and decrease prices of the metals to be extracted from the seabed, thus consumers - mainly developed nations - will benefit, whilst terrestrial producers - mainly developing nations - will be placed at a great disadvantage: apart from the abysmal drop in their export earnings, investments that would otherwise be made to expand production from terrestial mines would be rechannelled to other sectors.[57]

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[55] ibid. p. 9.

[56] See E. Luard, The Control of the Sea-bed. (1974) London, Heinemann. This abundance however is not to suggest that these resources are inexhaustible. They are in practical terms no different from other non-renewable mineral resources and although they grow by accretion, this is a very long process involving millions of years. See further, O. Schachter, Sharing the World's Resources. *op.cit*. p. 39.

The actual economic effects of seabed mining on land-based resources will therefore depend on the nature, extent and size of the industry as it develops. It is in fact estimated that even a small seabed mining industry would supply significant amounts of cobalt which would constitute a major problem for Zaire for example, which is a major landbased producer. For most African landbased producers of these minerals, their export form the backbone of their economies: Zambia, Zaire and Uganda for copper; Zambia, Zaire and Morocco for cobalt; Zaire, Gabon, Morocco and Ghana for manganese; Botswana and Burundi for nickel. Thus African states advocated not just an internationalization of the seabed, but also an equitable distribution of the benefits derived from the exploitation of these seabed resources, including the provision of an international fund which would be used in the implementation of measures adopted to speed their economic and social development.

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[57] Economic Implication of Seabed Mineral Development in the International Area. UN Doc. A/CONF. 62/25; Statement made by M.G.D. Arsenis on behalf of the Secretary-General of UNCTAD at the 42nd Meeting. UN Doc. A/CONF. 62/32. Off. Rec. UNCLOS III, Vol. 3, p. 40; p. 61.

E. JURIDICAL STATUS OF SEABED MINING UNDER INTERNATIONAL LAW

Before the mid-1960's there was little if any controversy as to the legal status of the seabed and subsoil and the resources thereof beyond the limits (which were rather vague) of national jurisdiction. However, about two decades ago when the Maltese proposal of a common heritage was introduced, an intense controversy had arisen among international jurists on this issue. The various views expressed by the opponents of the concept were based on tendentious arguments of conventional international law and/or traditional concepts.

One such school of thought argued that deep sea-bed mining constituted a freedom of the high seas based on article 2 of the 1958 Geneva Convention on the High Seas.[58]

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[58] 450 UNTS. 11. See for example, Kronmiller, The Lawfulness of Deep Seabed Mining. 2 Vol. (1980) Oceana Publication.

This view is based on the interpretation of this article which states:

> The High Seas being open to all nations, no nation may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under conditions laid down by these articles and by other rules of international law. It comprises *inter alia*, both for coastal and non-coastal states: a) freedom of navigation; b) freedom of fishing; c) freedom to lay submarine cables and pipelines; d) freedom to fly over the high seas.

The contention is that the activities listed herein are not exclusive and that the use of *inter alia* suggests that seabed mining, so long as it is compatible with the other freedoms of the high seas, is a legitimate use. Since there has been no authoritative judicial interpretation of this article, authority for this contention is drawn from the *travaux préparatoires* and commentaries of the International Law Commission which drafted this article.[59] The statement

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[58](cont'd) S.I. Burton, "Freedom of the Seas: International Law Appicable to Deep Seabed Mining Claims." (1976-77) 29 Stanford Law Rev. 1135; Ely, "Brief prepared for Deepsea Ventures Inc." Hearings on HR 11879 Before the Sub-Committee on Mines and Mining of the House Committee on Interior and Insular Affairs. 94th Congress, 2nd Sess. (1976) 181-85.

[59] According to articles 31 and 32 of the Vienna Convention on the Law of Treaties, *travaux préparatoires* of a negotiating conference can be used only as a "supplementary" means of interpretation to be examined only when the language and primary sources of interpretation: a) leave the meaning ambiguous or obscure; b) lead to a result which is manifestly absurd or unreasonable. But these should be used with caution and are important only if they truly reflect

in the commentary most frequently cited is that:

> the list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but it is aware that there are other freedoms...The Commission has not made specific mention of the freedom to explore and exploit the subsoil of the high seas. It is considered that such exploitation had not yet assumed sufficient practical importance to justify special regulation.[60]

However, it must be noted that during the 1958 Conference discussions on article 2, no decision was made, explicitly or implicitly[61] on the legal status of the seabed beyond the continental shelf in spite of the adoption of the inter alia language. Besides if the "*ejusdem generis*" rule of legal interpretation should be applied to the wording of article 2, then deep seabed mining cannot constitute a freedom within the meaning of inter alia. This is because mining is an activity radically different from those listed. Navigation, laying of submarine cables and overflight are activities which are not economically extractive, whereas mining basically is. An exception is taken for fishing since

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[59] (cont'd) the interest of the parties. See C.G. Fitzmaurice, "The Law and Procedure of the ICJ : Treaty Interpretation and Certain Other Treaty Points." [1951] BYBIL. p. 1.

[60] Yearbook of I.L.C. (1955) Vol. XX, 21-22; UN Doc. A/CN. 4/SER. A/1956.

[61] Off. Rec. UNCLOS J. Vol. 4, pp. 37-56, The only explicit proposal made by Portugal to include in the list a freedom of exploration, and scientific research was totally rejected. ibid. at p. 55.

the migratory nature of fisheries makes it peculiar and different from minerals which are *in situ*. Fisheries are a resource which can be lost through migration even if they are not harvested.

Article two also specifies that these freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in the exercise of the freedoms of the sea. Consequently, in order to be accepted as a freedom of the high seas within the context of article two, deep seabed mining must be shown by 'general principles' to be a legitimate exercise of a freedom of the high seas.

Since it is clear that by the mid-1960's no clearly defined positive or customary norm of international law had emerged declaring deep seabed mining as a freedom of the high seas, advocates of this school of thought have often resorted to the traditional doctrine of *res communis* to found some general principle. If the actual seabed is considered as *res communis*, then although it is not susceptible to individual appropriation by states, all states are nevertheless entitled to a common unrestricted right of user. The Grotian doctrine of the freedom of the high seas was based largely on this idea of *res communis*: things which by nature are created for common use.[62] However, it is clear that subsequent development of rules governing the seas as a zone of common resources was closely tied to the special character of those resources or uses.[63] Consequently, such uses as were recognized as freedoms of the high seas were such that their exercise did not diminish or prejudice the future ability of other nations to use the seas. Deep seabed mining, primarily for polymetalic nodules is an exhaustive use[64] and once they are removed from one part of the seabed, they will not be there for others to enjoy. Prime mine sites if exploited vigorously could be completely exhausted within a few decades. Thus, the traditional concept of *res communis* cannot be applied to this novel use of the high seas - nodule mining - to make it another freedom within article two of the High Seas Convention.

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[62] Refer to Chapter One supra.

Some have even argued rather tenuously that the deep sea-bed should be considered as a *res nullius*,[65] so that individual states could acquire title and exercise sovereignty thereof in the same way as they do over land. However, the physical and geographical conditions of the seabed may not make the occupation[66] required to found a claim on *res nullius* possible. Moreover a claim to mine the deep seabed as one of the freedoms of the sea is not necessarily analogous to a claim of territorial sovereignty. As was observed in the Island of Palmas Case[67] a claim to:

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[63] See Newton, op. cit., p. 428 *et seq*.
[64] ibid p. 422. See also note 58 supra.
[65] See note 60 supra.
[66] O'Connell, D.P., The International Law of the Sea. Vol. I, pp. 457-8.
[67] [1928] 2 R.I.A.A. 829.

> territorial sovereignty...involves the exclusive right to display the activities of a state (which) right has as its corollary a duty: the obligation to protect within the territory the right of other states...territorial sovereignty cannot limit itself to its negative side, i.e. to excluding activities of other states; for it serves to divide between nations the space upon which human activities are employed in order to assure them at all points the minimum of protection of which international law is the guardian.[68]

Those claiming to acquire rights on the seabed have only one purpose in mind, the mining of the nodules found there. Therefore, the application of land drawn analogies based on *terra nullius* are not only inappropriate, but would generate considerable disorder entailing inconsistent claims by various states. There is also authority in international law to the effect that not all unclaimed land necessarily constitutes *res nullius*.[69] There is no prior state practice or treaty to the effect that the seabed is subject to the same rules as unclaimed land, and to further strengthen this view, *res nullius* was rejected by the International Law Commission and the 1958 Conference as a basis for a claim to the continental shelf, which position is now firmly established as a principle of International Law.[70]

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[68] id. p. 839.

[69] Claims of sovereignty to parts of Antartica based on this doctrine have been rejected, so have claims to outer space. See J. Kish, The Law of International Spaces. (1973) Sijhoff, Leiden. p. 72. Bin Cheng, "U.N. Resolutions on Outer Space: "Instant" International Customary Law?" (1965) 5 I.J.I.L. p. 23.

Thus prior to 1967 when Dr. Arvid Pardo introduced the Common Heritage Concept in the General Assembly debates, there was no settled international law on the legal status of deep seabed mining, and it was not clear whether or not states could acquire and claim sovereignty over this area and by what measure. Debates on this issue were inconclusive and largely sterile. For the most part arguments put forward were circular based on predetermined results. Such statements therefore were merely academic and hypothetical at best, unsupported by practice and untested by controversy.

THE "COMMON HERITAGE OF MANKIND" CONCEPT.

> "It would be inconceivable...that the course of history could be changed by an individual like Dr. Pardo or by a small and powerless state like Malta. A three-hour speech by a man with no divisions behind him can at most cause a ripple in the surface of events." (R.C. Ogley, *op. cit.* p. 32).

This is reminiscent of the English attitudes to the "Dutch upstart" centuries ago when Grotius published his *Mare Liberum* and more recently of the one-man crusade by Raphael Lemkin who invented the term genocide. Thus such vituperative dismissal of what may well crystalize into a legal norm as did *mare liberum*, must be ignored. In looking at legal principles, particularly in the realm of international law, care must be taken not to give undue attention to mere verbiage. Any new principle of international law must be examined from the point of view of the needs of society at any point in history. One only has to look back to the Selden/Grotius controversy in the seventeenth century to understand the importance of this approach. International law rules evolve from the practice of states which practice is directly drawn from the needs of society at any point in time, as we have seen in relation to both the continental shelf and the exclusive economic zone.

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[70] See text accompanying notes 13, 14 *supra*.

As a matter of fact, Pardo's proposal that there should be drawn up a "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the seabed and ocean floor underlying the seas beyond the present limits of national jurisdiction, and the use of their resources in the interest of mankind," is fast becoming a reality. The proposal had two dimensions:

a. to secure the demilitarisation of the seabed and,
b. to prevent a potential "scramble for seabed minerals."

From a strictly legal perspective, this constitutes a bold initiative to fill a *lacuna* in the law of the sea as well as a trend towards the progressive development of international law.

It is not surprising therefore to find that three years after the Maltese proposal, the United Nations General Assembly voted overwhelmingly[71] for a resolution declaring

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[71] The votes were 108 to nil in favour with 14 abstentions.

inter alia that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination, in accordance with the international régime to be estabished.

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate

> international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.[72]

This is evidence of the growing global concern both within and without the United Nations to utilize the resources of the sea beyond the territorial sea, and underlying the high seas for the benefit of mankind, and especially to speed the development of the less developed countries.[73] But it was the Maltese initiative which set the whole international decision-making process in motion towards negotiating for a new law of the sea.[74]

The meaning and content of the concept as outlined in the 1970 Declaration of principles admits of various interpretations ranging from that supporting open access to sea-bed resources under the freedom of the high seas to that supporting a moratorium on unilateral development of seabed resources pending the establishment of an international organization to govern the area.[75] This has considerably watered down its legal significance and created certain ambiguities and uncertainties, at least in theory.

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[72] Declaration of Principles Governing the Seabed and the Ocean Floor, and the subsoil thereof beyond the limits of national jurisdiction. G.A. Resolution 2749, Dec. 17, 1970.

[73] See Luard, op. cit. p. 85; Rembe, op. cit. pp. 36-9.

[74] The Special Seabed Committee set up *inter alia* to "Study and elaborate the legal principles and norms that would meet the exploration for and exploitation of the seabed resources and the interests of humanity as a whole," subsequently became the preparatory committee of the Law of the Sea Conference. This committee had twenty-six African states as members.

The reference to "mankind" in the concept is not peculiar. Most declarations of the United Nations Organization have often made preambular references to the protection of "mankind."[76] In fact the Outer Space Treaty stipulates that the exploration and use of outer space shall be carried out in the interest of all countries, and shall be the province of all mankind, and all the astronauts shall be regarded by the parties as envoys of mankind.[77] This and other innumerable instances of the use of the term mankind which are futile if not impossible to recall confirm the view that the novelty surrounding the concept of 'the common heritage of mankind' lies only in the fact that this phrase is being used in international legal documents giving rise to the implication that a new legal concept is being created.[78] It can be considered as a mere application of an old concept to a new situation in a completely changed world environment.

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[75] A.V. Lowe *et al*. The Law of the Sea. *op. cit*. p. 159. See also Ogley, op. cit. pp. 31-42.
[76] See for example, Preamble to the United Nations Charter: "to save succeeding generations from the scourge of war which twice has brought untold sorrow to mankind..."; Treaty on the Non-Proliferation of Nuclear Weapons. [1970] 729 UNTS. 169. See also Gorove, "The Concept of Common Heritage of Mankind: A political, moral or legal innovation?" (1972) 9. San Diego L. Rev.. 390-393.
[77] Outer Space Treaty (1967) 610 UNTS 206. articles 1 & 5.

Thus there may even be justification for using the Common Heritage of Mankind to create new international legal norms to regulate ocean space because:

> the development and growth of the law of the sea like most other laws is a slow process, therefore terms and phrases which presently carry vague or general connotations may with the passage of time ripen into legal concepts and principles.[79].

As a matter of fact, the main difference between the "common heritage" concept and that of *res communis* is that, whereas the latter carries with it the idea of a community and common use, the former goes further to emphasize the idea of a heritage and trust focusing on future generations and not merely the present.

In view of the general trend in international legal evolution toward global social justice and the welfare of mankind in general, the introduction of this concept with regard to the resources of the sea must be regarded as an appropriate and important initiative towards a progressive development of international law. After all as society changes, law must also change and certain traditional doctrines have to be modified or replaced to suit present and future needs.

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[78] Gorove, Loc. cit.
[79] ibid. p.402

The concept becomes even more crucial when it is realized that the application of the old concept of *res communis* will in reality turn the deep seabed into a *de facto* national property for the developed countries with technological capabilities, hence excluding the vast majority of the world's population from the fruits of this area.

The concept of "common heritage" is therefore central to the evolving regime of the deep seabed notwithstanding that its meaning and legal significance lack precision. One certainty is that it entails the idea of common use and common management of property which directly underscores international cooperation and peaceful uses of the area. As Luard observes, the categorical assumption in the 1970 declaration of principles governing the seabed that all activities regarding the exploration and exploitation of the resources of the area...shall be governed by the international regime to be established was quite significant,

> [f]or though the nature of that regime was still unknown and subject to dispute, it was at least publicly recognized that there was to exist some kind of international regulation (and) [i]t would be difficult for any government to justify a unilateral attempt to claim prospective rights which were independent of an agreed system of

> exploitation...the situation of anarchy in the deep sea-bed that had been previously widely acknowledged and generally accepted was now formally rejected.[80]

F. CONVENTIONAL PROVISIONS REGARDING DEEP SEABED MINING

As far as African states are concerned, the enormous wealth of the seabed has to be exploited for the benefit not only of the few developed countries, but for all developing nations as well, in fulfilment of the global concern to bridge the technological and economic gap between the two groups of countries in order to estabish a new, equitable and just international economic and social order. Since the liberation of land territories and the resources therein after the partition and scramble for Africa, a century ago, had taken a painful and long process of decolonisation, African states particularly worked for an effective international regime and machinery, free from the control of any state or group of states. For example, the Ghanaian delegate at the third conference

> supported the establishment of an autonomous regime with legal bodies of its own and in effective control of all activities in the area of the seabed and ocean floor beyond the limits of national jurisdiction. That position stemmed from memories of the eighteenth and nineteenth centuries when, in the scramble for overseas territories, the colonialists

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[80] Luard, op. cit. p. 136-7.

> had parcelled out African lands which had taken over a century to recover.[81]

Needless to say the search for an acceptable international regime and machinery has been a very thorny issue to which African contribution has been extremely significant.[82] This issue was the main item on the agenda of the first committee, chaired by the Camerounian delegate B.P. Engo.

The views of developing countries generally on the seabed are contained in the Draft Statute for an International Seabed Authority tabled very early in the seabed committee by Tanzania.[83] This document envisaged the establishment of a body with comprehensive powers to regulate all activities in the area including *inter alia* powers to: exploit the area itself; issue licenses; provide for the equitable sharing of raw materials, funds and other benefits. The regional position as articulated by the Chairman of the African Group in the first committee, Mr. K. Tshikala of Zaire,[84] was that

> the resources of the seabed are the common heritage of mankind and should be managed for the benefit of mankind as a whole, special account being taken in the interests of the developing countries. The

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[81] Off. Rec. UNCLOS III, Vol. I, p. 87, para. 92.
[82] See P.S. Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third Conference." (1979). 7 ODILA. 89; A.D. Adede, "The Group of 77 and the Establishment of the International Sea-bed Authority." ibid. p. 31. Rembe, op. cit. pp. 36-76.
[83] U.N. Doc. A/AC. 138/33. (1971).
[84] Off. Rec. UNCLOS III, Vol. II, p. 65. Zaire is going to be substantially affected by seabed mining.

> exploitation of the resources must be wisely managed: anarchy would not benefit consumers, but rational exploitation would benefit all mankind. The international community must defend the right of every country to survival. The African countries advocate an instrument covering the whole international zone, which should not estabish the right of the strongest or of the first comers, but ensure that general interest prevailed.[85]

This position, shared also by the Group of 77, was diametrically opposed to that of the developed countries, which envisaged the establishment of a *laisser-faire* regime whereby the authority would essentially be a mere licensing and registration body.

After profound political and economic conflicts on this issue, the 1982 Convention has for the first time established a legal regime to govern all activities connected with the exploration and exploitation of mineral resources in and on the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[86] According to this Convention, the Area, which comprises about sixty percent[87] of the whole seabed and its resources[88] are the 'common heritage of mankind' and are not susceptible of unilateral national appropriation.

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[85] ibid para. 18.
[86] 1982 Convention on Law of the Sea. Art. 1(1) 134 (2).
[87] See pp. 146-149 supra on the Outer Limits of the Continental Shelf.
[88] Art. 133 of the Convention defines these resources as all solid, or gaseous mineral resources *in situ*.

Exploration or Exploitation rights can therefore be obtained only in accordance with the conventional regime and with the approval or authorization of the International Seabed Authority.[89]

In spite of the abundance of literature[90] on the conventional regime for seabedmining, the present writer found none which examined this regime from a purely African perspective, which is particularly significant since Africans were very instrumental in the evolution of this regime. A modest attempt is therefore made here to examine this legal regime from an African perspective. A detailed outline of the provisions will not be necessary and only the salient points will be highlighted.

The provisions on the Authority and the Area are contained in Part eleven of the Convention, and Annexes III and IV. They are representative of the gamut of divergent proposals put forward during the negotiations, and unsurprisingly, they are quite confusing. In an effort to satisfy both the developed and developing countries, provision is made for a so called 'parallel system' whereby:

a. An international Seabed Authority will be set up, with its own operating arm, the Enterprise to undertake seabed mining;

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[89] Art. 136, 137 of LOSC.

[90] For example, E.D. Brown, The Legal Regime of Hydrospace. [1971] London, B. Buzan, Seabed Politics. (1976) New York. R.P. Anand, Legal Regime of the Seabed and Developing Countries. [1976] Leyden; W. Hauser, The Legal Regime for Deep Seabed Mining Under the Law of the Sea Convention. (1983) Kluman B.V. Deventa; R.J. Payne, "African Economic Problems and the African Position on the Law of the Sea in Relation to Management Nodules." (1981) Vol. 15, Jour. of Dev. Areas. p. 19.

b. state enterprises and private entrepreneurs sponsored by states Parties would be able to operate alongside the Enterprise (Art. 153 (2) (a) (b)).

A third, but not so obvious category, is provided for in Annex III, Art. 9 (4) which states that:

> 4. Any State Party which is a developing State or any natural or juridical person sponsored by it and effectively controlled by it or by other developing State which is a qualified applicant, or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work pursuant to article 6 of this Annex with respect to a reserved area. The plan of work shall be considered if the Enterprise decides, pursuant to paragraph 1, that it does not intend to carry out activities in that area.

Thus most African states qualify under this provision to undertake seabed mining. However, most of them lack the basic technology to undertake deep seabed exploration and exploitation. Thus the only conceivable way they would directly benefit from seabed mining would be through the Enterprise, which is the operating aim of the Authority. According to article 170, the Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as provided for and shall act in accordance with the Convention, rules and regulations and procedures of the Authority, as well as general policies established by the Assembly and shall be subject to the directives and control of the Council. Annex IV, which is the Statute of the Enterprise broadly outlines its legal personality. It is autonomous and there is no vicarious liability as between it and the Authority. Liability of its members is limited in respect of the financial obligations of the Enterprise. Its fifteen members are to be elected by the Assembly of the Authority[91] with due regard to the principles of equitable geographical representation. The Board members who are to be of the highest standard of competence with appropriate qualifications shall act in their personal (not national) capacity and shall be remunerated out of the funds of the Enterprise itself.

The Enterprise shall be financed by:

- the authority in accordance with article 173 (2) (b)
- voluntary contributions made by States Parties for the purpose of financing activities of the Enterprise
- loans
- turnover from operations.

Funds required for the development of one mine site, through all stages, from exploration to processing and marketing are to be assessed by a Preparatory Commission, and under article 11 (3) of Annex IV, states parties are to contribute half this amount in the form of long-term interest free loans, in accordance with a scale based on the United

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[91] See art. 160 (2) (2); Annex IV, Art. 5.

Nations Budgetary Scale. The other half is to be borrowed by the Enterprise from financial institutions on the world money and capital market. Since the Enterprise is essentially going to be in competition with private pioneer investors for developed states, it would be very difficult if not impossible to acquire the kind of initial capital needed. According to an M.I.T. Study[92] prepared in 1978, it is estimated that total development costs for a single mining project would be 559 million dollars, with annual operating costs of 100 million dollars and annual gross proceeds of 258 million dollars. With the relative indebtedness of the third world, private entrepreneurs from developed states are in a better position vis-a-vis raising the initial capital requirement.

The capital requirement, however, is not the only problem. Assuming that the Enterprise and the developing countries found enough capital to start production, they still have another hurdle to overcome : the requisite technology. To resolve the problem of undue competition, which will effectively diminish the rationale behind the Enterprise regime, prospective operators are required to submit a satisfactory written undertaking to comply *inter alia* with article 144 of the Convention.[93]

Article 144 (1) provides generally for the Authority to acquire technology and scientific knowledge relating to activities in the Area particularly in the interest of developing states. This according to subsection two must be done through the initiation and promotion of:

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[92] J.D. Nyhart *et. al.*, A Cost Model of Deep Ocean Mining and Associated Regulatory Issues. (1978) Cambridge; MIT Sea Grant Program.

[93] Annex III, Art. 1(a).

> a. programmes for the transfer of technology to the Enterprise and to developing states with regard to activities in the Area, including *inter alia*, facilitating the access of the Enterprise and of Developing states to the relevant technology, under fair and reasonable terms and conditions;
>
> b. measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing states.

Technology for the purposes of these provisions is defined in article 5 (8) of Annex III as:

> the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.

Annex III which stipulates the basic conditions of prospecting, exploration and exploitation has elaborate articles on the transfer of technology. According to article 5 (3):

> 3. Every contract for carrying out activities in the Area shall contain the following undertakings by the contractor:

a. to make available to the Enterprise on fair and reasonable commercial terms and conditions, whenever the Authority so requests, the technology which he uses in carrying out activities in the Area under the contract, which the contractor is legally entitled to transfer. This shall be done by means of licences or other appropriate arrangements which the contractor shall negotiate with the Enterprise and which shall be set forth in a specific agreement supplementary to the contract. This undertaking may be invoked only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market on fair and reasonable commercial terms and conditions;

b. to obtain a written assurance from the owner of any technology used in carrying out activities in the Area under the contract, which is not generally available on the open market and which is not covered by subparagraph (a), that the owner will, whenever the Authority so requests, make that technology available to the Enterprise under licence or other appropriate arrangements and on fair and reasonable commercial terms and conditions, to the same extent as made available to the contractor. If this assurance is not obtained, the technology in question shall not be used by the contractor in carrying out activities in the Area;

c. to acquire from the owner by means of an enforceable contract, upon the request of the Enterprise and if it is possible to do so without substantial cost to the contractor, the legal right to transfer to the Enterprise any technology used by the contractor, in carrying out activities in the Area under the contract, which the contractor is otherwise not legally entitled to transfer and which is not generally available on the open market. In cases where there is a substantial corporate relationship between the contractor and the owner of the technology, the closeness of this relationship and the degree of control or influence shall be relevant to the determination whether all feasible measures have been taken to acquire such a right. In cases where the contractor exercises effective control over the owner, failure to acquire from the owner the legal right shall be considered relevant to the contractor's qualification for any subsequent application for approval of a plan of work;

d. to facilitate, upon the request of the Enterprise, the acquisition by the Enterprise of any technology covered by subparagraph (b), under licence or other appropriate arrangements and on fair and reasonable commercial terms and conditions, if the Enterprise decides to negotiate directly with the owner of the technology;

e. to take the same measures as are prescribed in subparagraphs (a), (b), (c) and (d) for the benefit of a developing State or group of developing States which has applied for a contract under article 9 of this Annex, provided that these measures shall be limited to the exploitation of the part of the area proposed by the contractor which has been reserved pursuant to article 8 of this Annex and provided that activities under the contract sought by the developing State or group of developing States would not involve transfer of technology to a third State or the nationals of a third State. The obligation under this provision shall only apply with respect to any given contractor where technology has not been requested by the Enterprise or transferred by that contractor to the Enterprise.

Merely providing for transfer of technology is not enough, because the effectiveness of these provisions really depends on the obligatory nature of these undertakings and their legal force. This can in turn be determined by the nature of redress available in the event of a breach or a misfeasance. Article 6 (4) and (5) of Annex III outlines these broadly. In case of a

a. dispute concerning undertakings re transfer of technology, such a dispute shall be subject to compulsory settlement in the sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea (Articles 186, 187, 189).

b. violation of such undertakings, the contract of the errant state or enterprise may be suspended or terminated. But such suspension or termination may be made only if:

1) in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious persistent and wilful violation of the fundamental terms of the contract, or

2) the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him.

It is not clear if the undertakings required by article 5 of Annex III constitute a fundamental term of the contracts granted to prospective operators, a wilful and persistent violation of which could result in a termination or suspension. Article 21 of Annex III dealing with the applicable law sheds no light on this. As a question of the interpretation of a contract, it is doubtful if an advisory opinion on this could be sought under article 191 since the latter provides that it is only the Assembly[94] or Council[95] which can request the Sea-Bed Disputes Chamber to give an advisory opinion, and then only on legal questions arising within the scope of their activities. Thus, a private entrepreneur cannot on its own determine this issue, neither can any interested third party, unless and until the Assembly or Council decides to do so.

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[94] See articles 159, 160, LOSC. 1982.
[95] See articles 161, 162, LOSC. 1982.

Alternatively, the Authority may impose upon the contractor monetary penalties proportionate to the seriousness of the violation, but only after the operator or contractor has been accorded a reasonable opportunity to exhaust judicial remedies available to him under the convention.[96] Consequently, any breach of these contractual undertakings - the purpose of which is to actually afford the Enterprise the requisite technology for its operations - does not carry any mandatory penalty, nor does it invalidate the contract *ipso facto*.

In the case of a dispute as to the reasonableness and fairness of the offers made by the contractor to the Enterprise to obtain appropriate technology to enable it to commence operations in the area in good time, either party is free to submit to binding commercial arbitration in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules regulation and procedures of the Authority.[97] In the alternative, where the Enterprise is unable to obtain such fair and reasonable terms, the Council or Assembly may convene a group of states parties actually engaged in activities in the Area, or states parties having access to such technology, to consult and take effective measures to ensure that such technology is made available to the

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[96] See articles 5(4), 18 of Annex III, LOSC. 1982.

[97] Annex III, Article 5(4), LOSC. 1982.

Enterprise on fair and reasonable commercial terms and conditions. Each such state party is enjoined to take all feasible measures to this end within its own legal system.[98]

Under such a regime, it is doubtful that most African states will directly participate in deep seabed mining. However, the Enterprise, through joint ventures with commercial operators[99] may be able to acquire the know-how and technology which will ultimately be passed on to nationals of developing states via the training programmes which the Authority, with the cooperation of seabed mining operators would promote. This is one way in which African states could immediately enjoy the benefits of the common heritage of mankind, assuming that their nationals benefit from such training programmes.

Another direct way of benefiting from deep seabed mining under the conventional regime is by way of a share of the profits earned by the Enterprise. There is no precise manner in which these financial benefits are to be distributed, but article 140 requires that whatever the forms of sharing they should be equitable. However, developing states which suffer adverse effects on their export earnings or economies as a result of decreases in mineral prices caused by seabed mining would have to be given preferential treatment.[100] There is speculation in any case that the financial benefits of seabed exploitation are likely to be relatively modest: one common guess is that by the end of this century monies would amount to about fifty cents per capita if distributed among the forty poorest states, and substantially less if other states such as India and China were to be included in the share out.[101]

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[98] Annex III, Art. 5(5).

[99] Annex III, Art. 11.

[100] This is discussed below.

For most African countries, especially those having mineral resources of one kind or another which still remain untapped due to lack of capital, it would be suicidal to invest heavily in seabed mining. A decade hence, when seabed mining technology becomes available for sale, most of them will still be struggling to feed themselves, and will not have the money to buy such technology.

G. IMPACT OF THE CONVENTIONAL REGIME ON AFRICAN LANDBASED PRODUCERS AND LANDLOCKED COUNTRIES.

Landlocked states which have little or no means of control over their access to the sea face enormous economic, social and administrative transit problems like delays and disruptions. Before they can exercise their right to the seabed area, a satisfactory solution must be found for their transit problems generally. Under the Convention such solution depends entirely on bilateral and/or regional agreements to be drawn up.[102] Smooth transit and free access are preconditions for landlocked states' access to the international seabed area.

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[101] Lowe, A.V. *et al*. op. cit.. p. 171.
[102] See art. 125 of 1982 Convention.

Incidentally most of these landlocked states are those likely to be adversely affected by seabed mineral production. States like Botswana, Burundi, Rwanda, Uganda and Zambia produce and rely heavily on the export of minerals that would be mined from the seabed. The addition of seabed production to the world market may lower the price of seabed minerals for the benefit of consumers but to the detriment of these nations and others whose major exports are these minerals. Any price fluctuations arising from increases in production would cause serious economic problems for them.[103]

Specific consideration was given at the conference to the problem of landbased producers generally. The Group of 77 specifically agitated for production controls, commodity agreements and compensation for affected developing nations. This was opposed by the developed countries (with the probable exception of Canada, itself a major nickel producer) which did not want any production controls but agreed to some form of compensatory assistance for losses incurred by landbased producers. They argued that production controls defied the laws of the free market economy.[104]

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[103] A/CONF. 62/25, A/CONF. 62/32.

[104] It is interesting to note however that even strict market economies have some form of national regulatory or control measures in respect of some natural resources. So what the Group of 77 was asking for was really not that extraordinary. The U.S. Government, to boost its own external trade has strict controls with respect to the marketing and production of such agricultural produce like wheat.

Under the Convention, the Authority is given the unique ability to ensure the implementation of seabed resource policies on a world wide scale. Article 150 (h) specifically addresses the problem of the impact of seabed mining on developing states and declares that production activities in the area shall be carried out in such a manner as to foster the healthy development of the world economy and balanced growth of international trade and to promote international cooperation. Production activities must be carried out with a view to ensure *inter alia*: the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area as provided for in article 151. This article outlines three major production policies which the authority can undertake in pursuance of the objective in Article 150 (h):

1. participation in International Commodity Agreements (Article 151 (1)).
2. establishing a quota system for seabed production (Art. 151 (2)).
3. Compensation and economic adjustment assistance measures for the benefit of developing country producers (Article 151 (4)).

In order to stabilize prices at a level both remunerative to producers and fair to consumers, the authority is entitled to participate in international commodity agreements and arrangements whereby various market regulatory measures are adopted, and in which all interested parties including both producers and consumers participate.[105] This kind of arrangement allows for the creation of buffer stocks and export quota mechanisms to check price fluctuations. Copper is subject to high price fluctuation which the Intergovernmental Council of Copper Exporting Countries (CIPEC) with Zaire and Zambia as members have not so far been able to stabillize. It is hoped that the influence of the Authority will eventually help stabilize the world price of copper through the creation of buffer stocks.

The quota system established under the conventional regime is based on a production ceiling derived from the growth of world nickel consumption. This ceiling is defined as the sum of the whole of the increase in world nickel consumption, during a five year period ending in the year before the earliest commercial production under the conventional regime; and sixty percent of the increase during the period between the year before the earliest commercial production and the year of application for a production authorization for such commercial production.[106] While reserving 38,000 tons of nickel from the ceiling for the initial use of the Enterprise, no single production authorization may exceed 46,500 tons of nickel per year. This is not, however, inflexible, for overproduction in some years may be compensated for by underproduction in other years.[107]

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[105] Art. 151 (1) (a) (b).

[106] Art. 151 (2)-(7).

Compensation payments and economic adjustments are also to be made available to developing countries whose economic situations suffer serious adverse effects from reduced prices or reduced export volumes to the extent that these declines are caused by deep-seabed activities. The potential beneficiaries of such a scheme are landbased producers of cobalt and manganese faced with the threat of a serious price drop. For cobalt, Zaire, and Zambia are obvious beneficiaries, and for manganese, Zaire, Gabon, Morocco and Ghana.[108] The convention does not set out the exact nature and extent of these compensatory and support measures but leaves it to be determined by the Economic Planning Commission, the Council and the Assembly.[109] The source of funds for such compensation is to be derived from revenues received by the Authority from seabed mining, which according to United Nations Conference in Trade and Development (UNCTAD) estimation may not be enough to compensate for all losses in export earning due to seabed mining.[110]

Moreover there is a potential conflict of interest here, for the Authority in deciding the amounts of such compensation payments will reduce its own disposable and distributable income.

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[107] id.

[108] Rembe, op. cit., p. 68, 69. See also Hauser op. cit. pp. 14-16.

[109] Art. 151 (10).

[110] Implications of the Exploitation of the Mineral Resources of the International Area of the Seabed: Issues of International Commodity Policy. UN Doc. TD/B/C. 1/170. Jan. 8, 1975.

Of all the production policy measures outlined above, it appears that a combination of the commodity agreements and compensatory measures will be best suited to safeguard the interests of and alleviate the hardships that will be caused to African landbased producers of seabed minerals.

VII. CHAPTER SIX

A. MARINE SCIENTIFIC RESEARCH AND OTHER MARINE USES

Apart from the uses discussed above, there are other potentially important aspects of ocean use which would greatly benefit most African states, coastal and landlocked. These uses have not been developed due to lack of the requisite technology as well as the relative inadequacy of the present level of scientific knowledge of the oceans.

Marine-related tourism for most parts of Africa is relatively undeveloped. Only a few areas like Tanzania, Kenya, Côte d'Ivoire and Senegal are well known for their great sunny and sandy beaches. However, the land and sea interface of most of Africa is naturally well-suited to tourism: apart from the excellent climatic conditions, the Atlantic ocean coast boasts of a wide range of geomorphological formations like long shore sand pits backed by large lagoons from Mauritania to Cape Verde; estuaries, low cliffs, promontories and sand bars along the Gulf of Guinea coast. The Indian Ocean coast also has its share of islands, reefs and lagoons. Thus given the overall natural beauty and cultural diversity, promotion of tourism by African coastal states would go a long way to alleviate some of their economic woes. Promotion of marine-related tourism is however related to the protection of the marine life and environment, which requires proper project coordination involving adequate research and management. Enforcement of environmental laws, or where they do not exist their enactment and enforcement is also crucial.

The oceans around Africa could also be an important source of thermal energy for the continent, for they are said to represent the largest solar energy collector available. Ocean Thermal Energy Conversion (OTEC), is by far the most promising technology available which is considered not only to be safe, but also to be environmentally benign.[1] This is the process whereby the temperature differentials between the warm surface tropical waters and the cold deep waters are harnessed, through alternate vaporisation and condensation to operate huge turbines for the production of electrical energy.[2]

Other more exotic methods of deriving energy from the ocean are through the waves and currents which can store mechanical energy, or extraction of physical energy through salinity gradients. Currently, it is the OTEC which is the most feasible, particularly for the West African region where the thermal gradient is said to be the most favourable in the world for OTEC given that potential development sites could be reasonably located near the shore.[3] The technology for this form of power generation is currently being developed by France, Japan and the United States, and when fully developed will offer significant advantages over existing alternative energy systems. The two forms of developing this kind of energy conversion, the closed-cycle system and the open-cycle system, both use the ocean as the energy source and as such eliminate the production of fuel pollutants. Since the ocean surface layers act as a natural energy storage facility, there is no need for putting up huge and expensive reservoirs and the process of generating this kind of energy becomes continual.[4] The basic process is also such that it is unlikely to cause any ecological imbalance and OTEC installations are generally said to be virtually non-polluting.[5]

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[1] L. Cuyvers, Ocean Uses and Their Regulation. (1984). p. 126. G.A. Hecker, "Ocean Thermal Energy Conversion on the High Seas: Towards an International Regulatory Regime." [1981] 18 San Diego L. Rev.. 473.

[2] See G.L. Wick, W.R. Schmitt. (ed.), Harvesting Ocean Energy. (1981) Paris Unesco Press.

[3] Ocean Energy Potential of the West African Region UNEP/1 G.22/INF. 7. (1981). The concept itself is not new, it having been first suggested in 1881 by a French engineer, Jacques d'Arsonval. An actual OTEC mechanism was built in 1930 in Mantanzas Bay in Cuba by a student of d'Arsonval. See R.D. Fuller, *infra* note 4, p. 243.

However, more research is required to make this process commercially feasible and to resolve associated technological problems such as the platform design, the seawater system and the power transmission cable.

In their newly acquired exclusive economic zones, African coastal states need to conserve and develop the living resources thereof in order to draw the maximum benefit of its food potential. This requires a better knowledge of ocean temperatures and currents to promote a better understanding of the environment in which fish stocks multiply and migrate. This is particularly important if the emphasis is to be balanced between conserving present stocks as well as developing future ones. This calls for research that will contribute to the development of the research base, such studies, as for example, have been conducted off the coasts of Ecuador, Peru and Chile, involving the 'El Nino.'[6] Over the past two decades, marine geological and geophysical research has yielded new scientific knowledge that has not only greatly stimulated geological thinking about the origin of the continents and ocean basins, but has much extended our understanding of the geological processes that form mineral resources or create volcanic and seismic activity. Tidal wave studies enhance meteorological knowledge required for agricultural and recreational purposes.[7] However, the most pressing need for marine scientific research is perhaps related to the preservation of the marine environment. Steps have already been taken at the international level to prevent or reduce marine pollution.[8] Since marine life is highly sensitive to pollution,[9] the availability of scientific information on pollution is most crucial for the rational management of the living resources of the sea especially in the exclusive economic zone. A pre-requisite of this is the continual integration of marine science and policy. Most industrial and domestic wastes from coastal and neighbouring states are disposed of in the sea, either directly or by way of rivers and streams flowing into the sea. As an important use of the ocean, such waste disposal needs regulation[10] which can be effected only by clearly identifying the issues involved, namely the nature of the pollutants and their effects on marine environment. As new substances are produced each day, research into their possible effects must be continuous.

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[4] R.D. Fuller, "Ocean Thermal Energy Conversion." (1978) 4 Ocean Management p. 241-258.

[5] Although at present the potential impact of OTEC plants is viewed as negligible, several eventual adverse environmental effects have been considered, such as the possible influence on ocean temperature of large-scale OTEC use and the consequences of moving vast quantities of seawater through such plants. See Fuller, op. cit. p. 253.

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[6] El Nino is a warm "counter current" that periodically deflects the northward flowing Humboldt current and cuts off the west coast of South America from the rich supplies of phytoplank on which the largest single-species fishery in the world, the anchove of Peru, depends for sustenance. See C. Maechling, Jr., "Freedom of Scientific Research: Stepchild of the Oceans." (1974-75) 15 Vir. J. I.L. 539, at 553. See also J.A. Knauss, "Development of the Freedom of Scientific Research Issue of the Third Law of the Sea Conference." (1973) 1 ODILA. 93, at 104.

[7] A.H.A. Soons, Marine Scientific Research and the Law of the Sea (1982) TMC. Asser Instituit, The Hague. pp. 11-16.

[8] See G.J. Timagenis, International Control of Marine Pollution. (1980) Dobbs Ferry, N.Y. 2 Vols.

It can therefore be observed that a focal point of all these aspects of ocean use is the geophysical, chemical and biological study of the oceans, involving inquiries as to the earth's crust and oceanic rock strata, volcanicity, destructive processes like cyclones and anticyclones and other phenomena basic to an adequate knowledge of the marine environment. Consequently, any rational development and management of both potential and existing ocean uses is closely linked to the promotion of marine scientific research. For most African states, their interest in such research is basically geared towards promotion and development of marine industries to foster national economic growth. Results of any scientific research, especially in the exclusive economic zone could be of utmost significance to whoever possesses it, for as has been observed

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[9] See M. Ruivo, (ed.). Marine Pollution and Sea Life. [1972] London, M. Waldichuk, "Coastal Marine Pollution and Fish." (1974) Ocean Management. pp. 1-60.

[10] Cuyvers, op. cit. pp. 67-107.

> ...[i]n the last analysis every particle of scientific knowledge [can] be translated into terms of economic gain or national security and, in a technological society, scientific knowledge mean[s] power.[11]

For the present purposes, Marine Scientific Research (MSR) can be defined as any study or related experimental work designed to increase man's knowledge of the marine environment.[12]

B. LEGAL STATUS OF MARINE SCIENTIFIC RESEARCH UNDER INTERNATIONAL LAW

Until the mid-twentieth century, the conduct of marine scientific research was virtually unregulated, since no specific mention was made of it in any legal literature before the second world war. The ravages of the war, the realisation that such research could be geared to such destructive ends, such as the military deployment of weapons, gave a new dimension to such research. The evolution of the continental shelf concept also added a new perspective to the conduct of marine scientific research in the hydrospace.

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[11] Statement of Brazilian Representative at the General Assembly Committee on Peaceful Uses of the Sea-Bed and Ocean Floor. UN Doc. A/AC. 138/SR. 54, 1971, Summary Records. p. 109.

[12] This is the definition adopted in the Informal Single Negotiating Text of the Third Committee of UNCLOS III. See UN Doc. A/CONF. 62/W. P. 8. May 7, 1975. The 1982 Convention, however, does not include any definition of marine scientific research. The absence of a definition as to what constitutes or does not constitute marine scientific research is a ground for potential disputes. See Soons, op. cit. pp. 5-8, 156-7.

1958 CONVENTIONAL REGIME

Although the Convention on the High Seas did not specify marine scientific research as a freedom of the high seas,[13] it has traditionally and/or customarily been treated as such.[14] Vessels of different states have often conducted research on the high seas for more than a century without any protests, and conduct of MSR on the high seas can be considered as a legitimate activity protected by the principle of freedom of the high seas.[15]

Thus under this regime, restrictions on research related only to the geographical areas under national jurisdiction or sovereignty, namely the territorial sea and the continental shelf.

Since the former is under the absolute sovereignty of the coastal state subject only to the duty to grant innocent passage,[16] it is clear that any research in this area requires the consent of the coastal state. It has been argued that during passage, a vessel cannot even undertake those scientific measurements which can be carried out at cruising speed without stopping or anchoring,[17] since the coastal state under the 1958 Conventional regime enjoys a large margin of discretion in respect of granting access to foreign vessels for the purpose of research. It has the sole discretion of determining what is or is not prejudicial to its peace, good order or security,[18] and all foreign vessels in the territorial sea are supposed to comply with rules and regulations enacted by the coastal state in conformity with the convention and other rules of international law.[19] The fact that generally, maritime powers maintain espionage 'trawlers' or so-called 'environmental research ships'[20] makes arguments in favour of less restrictions on scientific research in the territorial sea rather tenuous. A case in point is the 1968 incident involving the Pueblo, a United States ship posing as a research vessel, but which was actually engaged in espionage activities within the North Korean declared territorial sea of twelve miles.[21]

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[13] See article 2 of Geneva Convention on High Seas. (1958).

[14] The International Law Commission in its Commentaries specifically referred to marine research as an example of a freedom not mentioned in the article. See Chapter III, notes...

[15] Soons, op. cit. 47-52. This has been confirmed in art. 87 of the 1982 Convention. See infra sec. c.

[16] See Chpt. II supra on rights of coastal state in territorial sea and the right of innocent passage.

The 1958 Continental Shelf Convention deals more explicitly with marine scientific research in two provisions. Article 5 (1) states that:

'the exploration of the continental shelf and the

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[17] Soons, op. cit. p. 47, E.D. Brown, "Freedom of Scientific Research and the Legal Regime of Hydrospace." (1969) 9 IJIL. 327, 339.
[18] 1958 Territorial Sea Convention (TSC) art. 14 (4).
[19] ibid. art. 17. See also note 16 supra.
[20] Soons, op. cit. pp. 56-76, A.V. Lowe *et al*. The Law of the Sea. (1983) pp. 255-6.
[21] See (1969) 63 AJIL. 682.

> exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the resources of the sea nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.'

However,

> the consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the promise that the coastal states shall have the right if it so desires to participate or be represented in the research and that in any event, the results shall be published.

These two provisions, read in the light of debates at the conference as well as in the International Law Commission seem to imply that scientific research not relating to the shelf itself, conducted in the superjacent waters would not require the consent of the coastal state. This stems from the fact that the waters above the continental shelf have traditionally been considered as part of the High Seas.

However, most of these waters will now become part of the exclusive economic zone and their status as high seas will be changed. Generally, the right of the coastal state to grant consent in respect of research on the continental shelf is a corollary of the nature of sovereignty which it exercises therein.[22] Any research relating to the shelf, howsoever and wherever conducted must be subject to the consent of the coastal state.[23]

The reference to purely scientific research in respect of which a coastal state may not normally withhold consent is rather ambiguous. The distinction sought to be made here is rather subtle and it is not always clear what may be pure research since invariably the results of most researches are useful either directly or indirectly. In any case the results of such research must be published and a coastal state has a right to participate or be represented. Essentially, the conventional framework established here is one of a consent regime with a duty on the coastal state to normally grant permission in respect of pure research where the results will be published. Problems of interpretation have undoubtedly arisen, such as the meaning of "normally," and whether research "concerning the shelf and undertaken there" includes research conducted in the water column.[24]

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[22] See Chpt. 5 supra on the juridical nature of the Continental Shelf.

[23] Soons op. cit. p. 71.

[24] See a discussion of these problems in M. Redfield, "The Legal Framework for Ocean Research." in W.S. Wooster (ed.) Freedom of Oceanic Research. (1973) Krane Russak, N.Y. pp. 44, 52-58.

Under customary international law a practice has evolved whereby vessels of a researching state normally request permission from the coastal state before undertaking any research in an area within national jurisdiction.[25] Thus there is a tacit acknowledgement that a coastal state exercises a certain kind of jurisdiction over the conduct of marine scientific research in or on its continental shelf as well as its water column.[26]

The development of the concept of the exclusive fishing zone prior to the third conference on the law of the sea seems to have further restricted the geographical extent of the freedom of marine scientific research. By 1974, the International Court of Justice had declared in the Fisheries Jurisdiction Case that:

> Two concepts have crystalized as customary law in recent years...the concept of the fishery zone, the area in which a state may claim exclusive fishery jurisdiction independently of its territorial sea...up to a 12-mile limit from the baselines appears now to be generally accepted.[27]

Where any scientific research in this zone involves the taking of fish, coastal states have generally claimed the competence to regulate such research without any protests,[28] because the right to take fish in this zone belongs exclusively to the coastal state.

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[25] See W.S. Wooster, "Research in Troubled Waters: U.S. Research Vessel Clearance Experience, (1972-78)." (1981) 9 ODILA. 219-39.

[26] Soons, op. cit. pp. 81-82.

[27] [1974] ICJ Reports, 4, 24.

[28] A.V. Lowe *et. al*. op. cit., pp. 256-7; Soons op.cit., pp.

The practice of most African coastal states prior to the adoption of the 1982 Convention seems to indicate that they regard marine scientific research in the territorial sea, on the continental shelf and within their declared fishing and or exclusive economic zones, as being subject to their jurisdictional control. Most of their national legislations relating to these maritime zones make this clear as indicated by the following:

1. The Seychelles Maritime Zones Act, 1977. Sec. 7 (c) states that Seychelles has in its continental shelf and exclusive economic zone (200 nautical miles from the baseline) exclusive jurisdiction to authorize, regulate and conduct scientific research;[29]
2. The schedule to the Kenyan Proclamation of 1979 on the Exclusive Economic Zone states that Kenya exercises exclusive jurisdiction with respect to authorization, and control of scientific research within this zone.[30]
3. Côte d'Ivoire Law No. 77-926, article 6 states that all scientific research activities conducted within the 200 nautical-mile zone shall be subject to the prior consent of the state and shall be done in accordance with locally prescribed conditions.[31]
4. The Mauritanian Code of the Merchant Marine and Maritime

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[28] (cont'd) 82-86.

[29] National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone. United Nations Publication, Sales No. E. 85.V.10. p. 275.

[30] ibid. p. 171.

[31] ibid. p. 71.

Fisheries of 1978, Law No. 78, 043, provides that the Mauritanian State shall within its 130-mile exclusive economic zone, exercise its jurisdiction as concerns marine scientific research.[32]

C. MARINE SCIENTIFIC RESEARCH UNDER THE 1982 CONVENTIONAL REGIME

One key to the success of Exclusive Economic Zone management and protection of the marine environment is scientific research, as most states have now come to appreciate. At the same time, marine scientific research for military purposes is of strategic importance in an era when nuclear submarines constitute a first line of defence for the major Powers. Consequently the control of marine scientific research was an important topic at the third conference. The regime established by the 1982 Convention in respect thereof to a large extent endorses state practice, and reflects the desire of many states to attain the greater economic self-sufficiency that comes with scientific knowledge. Like other existing aspects of sea use, norms regulating the conduct of marine scientific research as established in the convention depend on the geographical scope of such research.

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[32] ibid p. 175.

Internal Waters[33]

Scientific research here is subject to the complete authority of the coastal state. This is a consequence of the sovereignty of the coastal state over these waters as well as the airspace above them. Thus the permission of the coastal state must be obtained for access to such waters for the purpose of conducting research. Permission granted for ordinary navigational purposes is not enough, consequently any vessel engaged in scientific research in internal waters without a specific authorization is in breach of international law.

Territorial Sea

In this zone, the conduct of marine scientific research lies within the exclusive jurisdiction of the coastal state. This is a consequence of the exercise of its sovereignty over the territorial sea, thus scientific research by any other state or entity must be with the express consent of and under the conditions set forth by the coastal state.[34] Such jurisdictional control covers all aircraft conducting research in the airspace above the territorial waters as well. This is because the sovereignty of the coastal state extends to the airspace as provided for in article 2 (2) of the Convention. There is no indication as to how high this air space is anyway.

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[33] See Chapter 2.

[34] 1982 LOSC. article 245.

The right of innocent passage through territorial waters, however, does not include the right to undertake any research. This is clearly spelt out in article 19 (2)(5) which provides that the passage of a foreign ship is not considered as innocent, if such a vessel, during passage carries out any research or survey activities. Activities of a normal research vessel[35] during innocent passage involving any research or survey activities, even if started before entry into territorial waters, would be considered prejudicial to the peace, good order and security of the coastal state, and such a vessel may accordingly be asked to leave if the necessary consent has not been obtained. Article 21 (1) (g) allows the coastal state to adopt laws and regulations relating to innocent passage through its territorial waters, in respect of marine scientific research and hydrographic surveys, but such rules and regulations shall not apply to the design, construction or manning of equipment of foreign ships. These rules must be made public and foreign vessels must comply with them. They must therefore be easily accessible to all prospective researchers. Non-compliance with any such rule constitutes a breach which could result in the termination of passage.

A vessel engaged in transit passage[36] through straits or archipelagic waters may not carry out any research or survey activity without the prior authorization of the states bordering those straits.[37]

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[35] Vessels specifically equipped for research.
[36] Article 38 of LOSC.

High Seas

Marine Scientific Research is declared by the Convention to be a freedom of the high seas, open to all nations regardless of their geographical location.[38]. However, any research undertaken by virtue of this provision must be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole,[39] and the results thereof shall be effectively diseminated when available. The exercise of this freedom is also subject to the regime of the Area[40] or the concept of the common heritage of mankind. Furthermore states are urged to promote international cooperation in marine scientific research by participating in international bodies, for the benefit of developing and technologically less-developed countries. Thus MSR as a freedom of the high seas is not altogether unregulated, since it must conform to the international standards provided in the convention. It is doubtful if oceanographical research for military purposes on the high seas can be freely undertaken within the present conventional framework. This is because of the general principle in article 240, that marine scientific research shall be conducted exclusively for peaceful purposes. However, the extent to which the conventional provisions will promote arms control at sea depends on the balance of power in the global political arena. Most naval powers are unlikely to regard conventional provisions as restricting their routine naval operations.[41]

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[37] Article 40, 54 of LOSC.

[38] Article 87 (c) (f)

[39] It has been argued that 'what constitutes a benefit for humanity ...depends on one's point of view.' See A.A. Yusuf, "Toward a new legal framework for marine scientific research ; coastal-state consent and international law" (1979) 19 Vir. J. I. L. 413 at 416.

[40] The area is defined by article 1 as the seabed and ocean floor thereof beyond the limits of national jurisdiction.

E.E.Z. and Continental Shelf

The most significant provisions regarding the conduct of MSR under the 1982 Convention are those relating to the E.E.Z. and the Continental Shelf. The coastal state has jurisdiction in these zones to regulate, authorize and conduct marine scientific research.[42] Article 246 (2) basically estabilshes a consent regime as in the 1958 Conventional Regime. However, this regime differs in the sense that the provisions seek to clear the ambiguity surrounding the word "normally" in the earlier regime, by substituting "normal circumstances." In an attempt to clarify this even further, it stipulates that "normal circumstances" may prevail whether or not diplomatic relations exist between the coastal state and the researching state.[43] Interpreted widely, normal circumstances could cover even situations where two governments do not accord each other recognition. Thus mere absence of diplomatic relations or recognition does not entail abnormality. However, where the two countries are in a state of imminent or actual armed conflict, there could be said to be abnormal circumstances. It has been suggested that 'normal circumstances' may also concern the general political situation within the region of which the coastal state is part,[44] however, the key point is that the abnormal circumstances that would justify a denial of consent must refer to such circumstances between the coastal state and the researching state characterized by hostility or tension of such a serious nature as rationally to preclude the granting of consent.[45]

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[41] Churchill *et. al*. op. cit. p. 276.
[42] Art. 246 (1).
[43] Art. 246 (3) (4).

The coastal state is however given the discretion to withhold consent to the conduct of a marine scientific research project of another state or competent organization, if that project:

a. is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

b. involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

c. involves the construction, operation and use of artificial islands, installations and structures; (the right to construct and use such structures in the E.E.Z. and on the Continental Shelf is reserved exclusively to the coastal state. See articles 60, 80).

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[44] Soons, op. cit. p. 168.

[45] See B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)." (1980) 74 AJIL p. 25, at 26.

If there have been inaccuracies in information given by the researching state regarding the proposed research, or if the researching state has outstanding obligations to the coastal state from a prior research project, again the coastal state may withhold consent. What is not clear however, is whether the latter refers only to marine-related research or covers landbased projects as well. It is submitted that in accordance with article 31 (1) of the Vienna Convention on the law of treaties[46] prior research project should be interpreted as a prior marine-related research project. Thus a breach of an obligation on a land-based project by a prospective researching state or its nationals, should not be the basis for withholding consent.

In any event, no authorized research activity shall unjustifiably interfere with activities undertaken by coastal states in the exercise of their sovereign rights and jurisdiction as provided for in the Convention.[47]

There are also certain specified conditions to be met by states and/or international organizations intending to undertake Marine Scientific Research in the E.E.Z. or on the continental shelf of another state. These constitute a duty to provide certain information to the coastal state which is an essential element for the effective implementation of the full consent regime established by article 246. Thus according to article 248 information on the nature and objective of the project, the means and methods to be employed including all details of the research vessel and its scientific equipment and precise geographical coordinates of the research area, will have to be supplied to the coastal state at least six months prior to the anticipated commencement date. The coastal state will have to be informed also of the approximate dates of arrival at and departure from the research area, the names of the sponsoring institution, its director and the scientist in charge of the project, as well as facilities contemplated for participation by the coastal state.

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[46] A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[47] Art. 246 (8).

These provisions, whilst enabling the coastal state to evaluate and verify the nature of the research, and to take a decision on possible participation, also lay down the international standards for advance notification in respect of marine scientific research. Article 249 imposes further duties on states and competent international organizations desiring to undertake scientific research in this area. They must ensure the right of the coastal state to participate or be represented in the research project, if the coastal state so desires, without payment of any remuneration to its scientists and without obligation to contribute towards the costs of the project. At its request, the coastal state must be provided "as soon as practicable" with preliminary reports as well as the final results and conclusions after the completion of the research. Access must also be given upon request by the coastal state, to all data and samples derived from the research project, including data that can be copied and samples which may be divided without detriment to their scientific value. Assistance must, where requested, be provided to a coastal state for the assessment of such data, samples and research results furnished.

D. LANDLOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES

Where states or other international organizations have submitted a project to conduct marine scientific research in the E.E.Z. or on the continental shelf, which research is exclusively for peaceful purposes and geared towards increasing the general scientific knowledge of the marine environment for the benefit of all mankind,[48] then neighbouring landlocked and geographically disadvantaged states in the region have to be notified.[49] When the necessary consent has been obtained, these states, if they so desire, may request that all the relevant information about the project be furnished to them as specified in articles 248 and 249 (1)(f). They shall also be given an opportunity to participate in such projects where it is feasible and appropriate. Their participation however can only be "through qualified experts appointed by them,"[50] which seems to preclude sending non-experts to participate in the project with a view to training them in the process of such participation. Since these states can only participate through experts, and since most of the African landlocked and geographically-disadvantaged states do not yet have nationals who are oceanographic scientists, they would have to find such experts from outside which would cost money and be of little benefit to them. In practical terms, most African landlocked states cannot undertake such researches on their own because they lack the necessary technology and finance.

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[48] Article 246 (3).
[49] Article 254 (1).

Thus it would appear that these provisions do very little if anything at all to promote the interests of developing landlocked states. One might ask how it is hoped that these states will eventually attain the scientific expertise to allow them to participate fully in oceanographic activities within the spirit of the concept of the common heritage of mankind.

E. TRANSFER OF TECHNOLOGY

That this was an all important issue at the third conference on the law of the sea is not surprising, considering that for the past three decades it has never ceased to appear on the agenda or work programmes of such United Nations bodies as UNCTAD, UNIDO, UNESCO and the FAO.

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[50] Article 254 (2).

The Declaration on the Establishment of the New International Economic Order, noting that 'the benefits of technological progress are not shared equitably by all members of the international community,' states as one of its principles, the granting of access to the developing countries to the achievements of modern science and technology, promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries.[51] UNCTAD in 1978 produced a draft International Code of Conduct on the Transfer of Technology[52] which seeks basically to facilitate the transfer of technology as well as reduce its cost to developing countries. There has also been a revision of the International Convention for the Protection of Industrial Property[53] by the World Intellectual Property Organization (WIPO). These deal generally with all kinds of technology, including marine technology. African states generally consider marine scientific research as being linked indissolubly to the transfer of marine science and technology. As expressed by the delegate of Somalia, there was an urgent need to bridge the ever-widening gap between developing and developed countries, and the Conference would fall short of its objectives if it did not agree on precise terms for the transfer of technology.[54] The Nigerian delegation expressed the view that there was a moral obligation to transfer technology on a contractual basis and not as charity,[55] a view shared by most developing countries as a means of restoring past unequal relationships within the overall global strategy for development of the developing countries and within the framework of the New International Economic Order.[56]

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[51] UNGA. Resolution 3201 (S-VI), para. i, 4(p): (1974) 13 *ILM* 715.
[52] (1980) 19 *ILM* 773.
[53] 1970 *UKTS* 61.
[54] Official Records, UNCLOS III, Vol. 4, p. 102, para. 7. See also statements of delegates from Kenya, *ibid*, p. 103, para.

However, the nature of proprietary interest in technology and the purely commercial character of its transfer make it difficult at the international level to impose strict legal controls in respect of transactions involving the transfer of technology, in the form, for example of a positive legal obligation to transfer.

To what extent then, can the proposed conventional regime impose a duty on the private sector to provide technology against its own perceived interest? This is what part fourteen of the 1982 Convention of the Law of the Sea seeks to achieve. Its basic objectives[57] are aimed at promoting:

1) the acquisition, evaluation, dissemination of and access to marine technological knowledge;
2) the development of appropriate marine technology;

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[54](cont'd) 35, Togo, ibid. p. 104, para. 49, Nigeria, ibid. p. 101, para. 5-6.

[55] ibid. Vol. II, p. 348, para. 15.

[56] See Rembe, Africa and the International Law of the Sea. (1980) p. 184. See also, L. Juda, "UNCLOS III and the New International Economic Order." (1979) 7 ODILA 221, at 248.

[57] 1982 Convention, article 268.

3) the development of the necessary infrastructure to facilitate the transfer of marine technology;
4) the development of human resources through training and education of nationals of developing states and countries especially those of the least developed among them;
5) international cooperation at all levels, particularly at the regional, subregional and bilateral levels.

The operative words, international cooperation as a concept is hard to define. Article 270 in an attempt to set parameters for such cooperation provides that "such cooperation shall be carried out where feasible and appropriate through existing bilateral, regional or multilateral programmes, or through expanded and new programmes." Appropriate funding must also be made available for ocean research and development. As to who is to provide such funds, it is not quite clear.

States are furthermore urged to promote directly or through a competent international organization, the establishment of generally accepted guidelines, criteria and standards for the transfer of marine technology on a bilateral basis or within the framework of international organizations and other fora, taking into account the interests and needs of developing states.[58] All programmes in the field of transfer of marine technology undertaken by competent international organizations shall be coordinated to promote the interests and needs of developing states, particularly the landlocked and geographically disadvantaged.[59] Cooperation however should proceed having 'due regard for all legitimate interests including, *inter alia* the rights and duties of holders, suppliers and recipients of marine technology.'[60] On the whole the provisions on the development and transfer of marine technology do not impose any specific legal rights and obligations. They are at best hortatory only, for example article 266 (3) which merely stipulates that "states shall endeavour to foster favourable economic and legal conditions for the transfer of marine technology for the benefit of all parties concerned on an equitable basis."

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[58] ibid. Art.271.

Thus the operationability of the conventional regime depends to a large extent on the good will of states who possess the technology and their attitudes vis-a-vis developing African states.

As a result of the exclusive economic zone and other geographical concepts established by the new regime, African coastal states may now have jurisdiction in respect of marine scientific research —over vast ocean areas. Specifically, they have discretionary powers to refuse consent to certain categories of research in their national zones or to suspend or withhold such consent if certain conditions are not met.[61] They are therefore well advised to exercise their rights and discretions rationally in order to obtain optimal benefits therefrom. The exploration and exploitation of the resources of the sea will require increased management capabilities and the requisite technology. African coastal states could negotiate 'transfer of technology clauses' in the various bilateral and multilateral agreements with developed countries in respect of the exploitation of fisheries and hydrocarbons in the exclusive economic zones or on the continental shelves. In order to do this however, they need to be aware of motivations behind such negotations and should not be easily taken in by immediate pecuniary benefits such as the generation of income within the country, which may well take the place of long-range development.[62]

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[59] ibid. Art. 272.
[60] ibid. Art. 267.

African legal experts on negotiating teams thus face a great responsiblity, because the outcome of any bilateral agreements ultimately depends on their drafting. The importance of training especially in the drafting field for African lawyers cannot be overemphasized here.

At a more parochial level, African states must cooperate as a region to promote the interests of landlocked and geographically disadvantaged states. Various spheres of cooperation are already evident in all the regions, for example the Mediterranean riparians have advanced an ecological region to combat the high level of pollution in the area and the density of navigation.[63] Their participation in such regional institutions as the IOFC (Indian Ocean Fishery Commission) and CECAF (Fisheries Committee for the Eastern Central Atlantic) side by side with developed countries could be fruitfully utilized to enhance cooperation in research, transfer of technology and training in marine affairs. A regional agreement along the lines of UNCTAD Code of Conduct for the transfer of technology could also help realize the objectives outlined in the convention.

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[61] ibid. Art. 248, 249, 253.

[62] See a discussion of this problem/issue by W.L. Black III, "Soviet Fishery Agreements With Developing Countries, Benefit or Burden?" (1983) Marine Policy 163.

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[63] R. Dupuy, The Law of the Sea: Current Legal Problems. (1974) Alphen van den Rijn: A.W. Sijthoff. p. 20.

CONCLUSION

A. WHY A PUBLIC INTERNATIONAL LAW OF THE SEA?

International ocean policy has over the centuries been determined by narrowly defined national interests and power capabilities, rather than by universal principles of *Ius gentium*, the persistent theme being a balance between the exercise of national jurisdiction and the idea of the freedom of the seas. As was observed in th first chapter, claims made by states over parts of the sea or otherwise were directly related to man's technological, ~~economic~~ and political developments as reflected by such works as Grotius' Mare Liberum and Selden's Mare Clausum which crystalised the two underlying concepts of modern oceans policy. Given the level of man's technological capabilities during the past three centuries right up to the middle of the twentieth century, Grotius' conception of the freedom of the seas prevailed. The general impression was that since the oceans could neither be possessed through occupation nor the resources thereof be totally exhausted, the vast expanse of the hydrospace could not be appropriated by any one state.

The development of the law of the sea itself is not independent of politics, geography and the economics of the real world, and since law can only exist in society, changes in the nature and extent of interests which the law seeks to regulate inevitably leads to changes in the substantive rules of law. Nowhere is this more true than in the sphere of public international law where these rules depend for their efficacy on acceptability by the sovereign states which constitute international society.

Therefore a knowledge of the factual background to the historical development of the law of the sea is important for a proper appreciation of the necessity for a public international law of the sea, especially as is being advocated by many African and third world states.

With the realisation by the middle of the century of the importance of the oceans, not only as the source of a great wealth of resources, but also that it had a considerable influence on world climate, new perspectives emerged *vis-a -vis* the international law of the sea. Thus the present approach seeks to :

1. accomodate the increasingly varying uses of the sea and;
2. resolve the inevitable conflicts which will arise in the course of such uses.

As the level of technology advances the list of potential conflicts between diverse uses grows, and the intensity and seriousness of such potential or actual conflicts escalates with the level of monetary investments in marine industries. Thus any ocean policy taken at the international level must not only define rights and duties, but must also establish an efffective machinery for conflict resolution.

Generally, public international law of the sea refers to that body of rules and regulations which states have to abide by in their relations inter se with respect to maritime activities. This is distinct from what may be refferred to as admiralty law, relating to such matters as marine insurance, contracts of affreightments, charter-parties, liens and bills of lading, consisting primarily of municipal legislations and belonging more to the realm of private international law. This also has its origins in the old maritime codes such as the Consulate of the Sea and the British Black Book of the Admiralty.[1]

Another distinction must be made regarding rules of maritime warfare, rules of neutrality and prize law. Although these constitute a significant aspect of the public international law of the sea, they have not had much prominence in contemporary law of the sea discussions. The reason for this is probably the fact that the law of the sea as we know it now is considered to be a peace-time phenomenon.[2] The law of the sea in the eighties has become more resource-oriented. The concept of a common heritage of mankind[3] has evolved in order to preserve the great wealth of the oceans for the whole of humanity and not just for those who possess the technical and financial abilities to tap these resources . Such an idea seemed to be in the interest of even the latter, for as the United States President Nixon observed in 1970, the issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an area of unrestrained exploitation and conflicting claims in which even the most advantaged states will be losers.[4]

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[1] See Chapter One, Note 21.

[2] However it may be observed that the old classification of 'war' and 'peace' as far as international law rules are concerned is now anachronistic, given the recognition of a status mixtus and the rampant occcurences of real situations of armed conflict. In fact with the present level of technology, and the aftermath of the atom bomb, naval diplomacy has assumed a greater and more significant role in international relations. See J. Cable, Gunboat Diplomacy, 1919-1979. (1981)

[3] See Chapter Five, pp.163-169 *supra*

The Convention on the law of the Sea signed on December 10, 1982 presents a monumental achievement of the international community, perhaps second only to the United Nations Charter. It is the first compreheensive treaty dealing with a broad spectrum of subjects and issues, relating to the uses and resources of the sea. Its 320 articles and 9 annexes cover twenty-five main topics and issues, with the fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time. It is expected that the Convention will promote the maintenance of international peace and security by replacing the plethora of conflicting claims by coastal states with universally agreed limits on the various maritime zones. To a great extent, these provisions represent not only a codification of customary norms of international law, but also a progressive development of the law. The Convention also provides for the creation of two new international organisations : the International Seabed

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[4] See, United States Oceans Policy : Statement by the President. May 23, 1970.Weekly Compilation of Presidential Documents. 6 :677.

Authority and the Law of the Sea Tribunal. The latter is not so peculiar, as there are tribunals of its kind already in existence in various fields of international activity.[5] The former however, is an organisation sui generis since its fundamental rationale is the management of resources in what has become known as the common heritage of mankind.

By providing inter alia for the limits of national jurisdiction over ocean space; access to the seas for landlocked states; freedom of navigation; protection and preservation of the marine environment; exploitation of the living resources and their conservation; scientific research and seabed mining, the convention actually establishes a comprehensive framework for the regulation of all of the hydrospace. It is hoped for example that the freedom of navigation will not be unduly hampered by establishing various regimes of passage for straits used for international navigation, archipelagos and the territorial sea. Various compromises have also been made in respect of the status of the exlusive economic zone. The paramount duty of all States parties is to respect the rights of others and the importance of article 300, which mandates good faith in the fulfilment of obligations and proscribes the abuse of rights, cannot be over-emphasized.

The Convention also contains important rules for the protection and preservation of the marine environment, the conservation and optimum utilisation of the living resources of the sea. The concept of an exclusive economic zone up to 200 nautical miles from the baselines has been accepted in order for coastal states to gain economic benefit from their offshore resources, which hitherto had been subject to the high seas regime. Whilst allowing the coastal state certain rights in this area of sea belt for economic advantage, the convention enjoins the state-beneficiary not only to maintain the traditional freedoms of the high seas, but also to allow neighbouring land-locked and geographically -disadvantaged states access to those resources of the zone which the coastal state does not exploit. But the exclusive economic zone can become an effective legal concept only if coastal states are prepared to adjust their policies to bring them into line with their new rights and duties. Generally, failure to exploit resources where others, now excluded, were already doing so would mean an overall loss to the world, and quite contrary to the spirit of the convention.

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[5] Such as the United Nations Commission for International Trade Law (UNICITRAL) , the General Agreement on Trade and Tarriffs,(GATT)

Most importantly, the Convention has translated the principle of a common heritage of mankind into a system of fair and workable institutions and arrangements for the exploitation, development and management of the resources of that part of the seabed and ocean floor beyond national jurisdiction. At the opening of the conference the way in which this moral yet practical objective was to be achieved was as uncharted as the seabed itself. Article 136[6] has indeed become as much a part of the customary international law of the sea as the freedom of navigation, and especially with the parallel system established under the regime of the Area, it is probable that any attempt by any state to mine the resources of the deep seabed regardless of the convention will earn the universal condemnation of the international community.

B. THE RELEVANCE OF THE NEW INTERNATIONAL ECONOMIC ORDER

It has been suggested that despite significant unified demands by developing countries for the establishment of a new international economic order, the meaning of the concept itself varies and its application is marred by narrowly defined concepts of national interests, security and sovereignty.[7] For the past two decades , it has almost become a cliché that the existing international economic system perpetuates inequalities between the technologically advanced and rich developed countries of the West, and the poor developing nations of the third world. Hence the call for radical changes that would ultimately establish a new and equitable international economic order.

Indeed the reality is that the research and development gap between the two sets of countries is abhorrent. Not even four percent of the amount spent globally on research and development is spent in developing countries. Over ninety percent of all scientists and technicians work in the developed countries despite the impressive cadre of engineers and professionals that most developing countries possess. Millions of people die everyday in the third world from hunger and diseases. Whilst the developed world is thriving, the third world is actually decaying. Hence for the latter it is imperative to establish an international economic framework more conducive to the realisation of their growth potential and to seek or assert sovereignty over their natural resources. A basic rationale for the establishment of a new international economic order is that all peoples have a right to the satisfaction of certain basic human needs and that those who have been able to do so have a responsibility to satisfy that right for others in the name of the solidarity of humanity. As the General Assembly in its declaration on the Establishment of the New International Economic Order recognised[8] there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing world. Consequently the prosperity of the international community as a whole depends upon the prosperity of its constituent parts, and international co-operation for development must be the hallmark of such an order. Indeed, the theme of co-operation runs through the whole of the 1982

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[6] which declares this area and its resources as the common heritage of mankind

[7] See R.J. Payne, J.R. Nassar, "The New International Economic Order at Sea" (1982) Vol. 17 Jour. of Dev. Areas. 31-50 at 32.

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[8] Resolution 3201(S-VI)in (1974) Vol. 13 I.L.M. 715.

Convention.

However, what has only recently been crystallised into a principle of international law, the right to development,[9] has always been at the core of some of the classical writings on international law, especially those of Emer de Vattel and Samuel Pufendorf.

Vattel cautioned that when the occasion arises, every Nation should give its aid to further the advancement of other nations and save them from disaster and ruin, so far as it can do so without running too great a risk for itself.[10] For

> if a nation is suffering from famine, all those who have provisions to spare should assist it in its need, without however, exposing themselves to scarcity (for) to give assistance in such dire straits is so instinctive an act of humanity that hardly any civilised Nation is to be found which would refuse absolutely to do so.[11]

He goes on to state that every

> nation should give its aid when the occasion arises, and according to its ability, not only to enable another nation to enjoy advantages (of a civil society - the necessities, comforts and pleasures of life), but to put it in a way to procure them

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[9] G. A. Resolution on the Declaration on the Right to Development. A/Res/41/128, Feb. 23, 1987. This was adopted by a margin of 146 votes to 1.

[10] Le Droit de Gens (1758) Transl. by Fenwick.BK.II C.I.

[11] *Ibid.*

> itself. Thus if an uncivilised state should desire to improve its condition and should apply to a civilised state for teachers to instruct it, the latter ought not to refuse them.[12]

It is said that every nation has a right to ask for assistance aand offices of humanity from another, but

> the right to those things which one nation naturally owes to another is an imperfect right; and since no one can compel another to perform those things to which he has only an imperfect right; no nation either can compel another to perform for it those things which nations are naturally bound to perform for each other.[13]

But as was emphasized by Pufendorf,

> a prince can forbid commodities grown or manufactured in his country from being exported by foreigners, such a power can (however) not be exercised where another nation is in so great a necessity of such commodities that it should perish;[14] for according to the general duties of humanity, the very nature of humanity requires that men be beneficent towards one another.[15]

Besides, the wellbeing of the whole human race depends on that of each and every part of the race.

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[12] *Ibid*.
[13] C.Wolff, Jus Gentium Methodo Scientifica Per Tractatum (1764) Leipzig. Transl. by J. H. Drake.Carnegie Classics. Chpt. II. Sec. 158. See also, Vattel, *op. cit*. sec. 10.
[14] De Jure Naturae et Gentium, Libri Octo. Transl. by Oldfather, Bk. V, Sec.10.
[15] *ibid*. Bk. III. Chpt.3.

Since the seas remaain a prime instance of interdependence among nations in all aspects, it only stands to reason that any conference on the law of the sea must necessarily have at its core these elementary principles of humanity and human development. Indeed, the law of the sea convention has added a new dimension to the development strategy at both the national and international levels. The concept of the common heritage of mankind, as a crucial underlying theme of the new intenational marine order to be established, is seen by most African states as an important model for the regime of the new international economic order. This regime which has largely failed in many areas of international cooperation,[16] may finally be partly realised by the implementation of the new marine regime to be established under the 1982 Convention. By assigning responsibilities to such international organisations as the International Seabed Authority (ISA), the prospective Law of the Sea Tribunal, the International Maritime Organisation (IMO), the Intergovernmental Oceanographic Commission (IOC), the FAO and the UNEP, the Convention paves a way for most developing African states to benefit directly from international cooperation and organisation. This is because these entities offer a forum for discussions and collective bargaining with industrialised countries thereby establishing a broader framework for multilateral development and cooperation.

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[16] See, S. Amin. "After the New Interational Economic Order : the future of International Economic Relations." (1982) 4 Trade and Development. p.9 at 12-16.

It is indeed true that such institutional arrangements which already exist for such cooperation have for the most part proved futile and practically ineffective, and a cynic may ask, of what use would these arrangements be? The reason for their hitherto ineffectiveness has been mainly due to the fact that very often decision-making within such arrangements is dominated by the developed countries, so decisions taken naturally reflect their own legal and political philosophies. However such a state of affairs can be obviated jf African states particularly, would clearly formulate their national and international policies and goals to reflect their own legal philosophies. In this regard the use of expert and competent jurists is crucial. Thus young African legal scholars must be encouraged to direct their energies towards making an international impact. Third World lawyers thus have a crucial role to play in establishing a new international economic order, especially where economists have failed.

C. IMPACT OF THE 1982 CONVENTION

The 1982 Convention represents an important stride in most areas of international law and relations. Apart from codifying older and broadly shared views of international law, the convention to a large extent has introduced a novel method of international negotiation in respect of certain ambiguous and unresolved matters under customary international law. This method of consensus has in fact been applied even to new matters which would otherwise not be susceptable to resolution through customary law-creating processes of claims and counterclaims. Another aspect of the convention's significance is that it spearheads an important trend which is vital to international law, namely the establishment of multilateral treaties on practically all aspects of important international activity. For, in the words of Secretary-General Javier Pérez de Cuéllar :

> the development of international law through treaties stems from the belief that written law will remove the uncertainties of the other prime source, customary law. It fills existing gaps in the law and gives precision to abstract general principles, the practical applications of which have not previously been settled.......
>
> (Thus)[a]lthough the new convention was not adopted by consensus, its general acceptance by the participants in the conference cannot be in question. It could just possibly be the most significant international legal instrument in this century.(Apart from the U.N. Charter of course.)[17]

As observed earlier, the regime envisaged by the 1982 Convention indeed provides various developmental opportunities for African states, especially with the expansion of coastal state jurisdiction over marine resources and uses. It also provides them with opportunities for initiatives in ocean management and development in these new jurisdictional zones. However the mere establishment of the regime is not enough. Substantial efforts are required on the part of African states in order to integrate these development and management initiatives. The challenge is great, since these initiatives must be pursued in a context not only of underdevelopment, but of political turmoil and regional diversity. Generally regional and/or subregional harmonization of ocean policies may be crucial for a national oceans strategy. In order to launch any meaningful oceans strategy therefore, there is aa need for :

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[17] See quoted in "A Quiet Revolution." U.N. Publication, Sales No.E.83.V.7. at p.60.

1. an accurate and updated marine scientific database ;
2. management and technical expertise;
3. a sound national investment policy and,
4. adequate onshore infrastructural facilities.

Scientific research is required not only to locate fish stocks and petroleum reserves, but also to facilitate the establishment of a coordinated scheme to address issues in marine development such as control of fishing quotas, pollution prevention and control. Thus in the long term, African coastal states must channel their energies into the training of ocean scientists, a field which is presently quite unexplored among African scientists.

Educational priorities must also be geared towards the development not only of marine scientists, but broad-based managers for the public service, who are sufficiently skilled in a number of ocean-related disciplines to regulate and manage with an awareness of the multi-sectoral nature of ocean development, and the interconnected and often conflicting requirements of different ocean uses.[18]

In addition to improving the artisanal domestic fishing industries, economic policies should be geared towards encouraging loocal enterprises in ocean industries. Thus the commercial and tax laws for example, must facilitate and promote such local ventures, whilst at the same time encouraging foreign investment especially with respect to the development of their offshore hydrocarbon potential, which in most cases may be only marginal.[19].

With respect to encouraging local initiatives in marine industries, most African governments have to put up the proper onshore infrastructural facilities for landing catch, storage and processing. Thus, although the establishment of the Conventional regime will in a large measure make important inroads in ocean development for African states, the implementation of this regime depends ultimately on the internal as well as regional policies undertaken by them. International law has paved the way, it is up to the various governments to reap the benefits.

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[18] See E. Gold.*et. al*.The Implementation of the New Law of the Sea in West Africa. p. 124.
[19] See Chpt. 4.*supra*

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Appendix One

African States Parties to Geneva Conventions

State	Territorial Sea & Contiguous Zone	High Seas	Fishing & Conservation of Resources of High Seas	Continental Shelf	Optional Protocol
Burkina Faso		1965 (a)	1965 (a)		
Central African Rep.		1962 (a)			
Ghana	1958 (s)	1958 (s)	1958 (s)	1958 (s)	1958 (s)
Kenya	1969 (a)	1969 (a)	1969 (a)	1969 (a)	
Lesotho	1973 (d)	1973 (d)	1973 (d)	1973 (d)	
Liberia	1958 (s)	1958 (s)	1958 (s)	1958 (s)	1958 (s)
Madagascar	1962 (a)	1962 (a)	1962 (a)	1962 (a)	1962 (s)
Malawi	1965 (a)	1965 (a)	1965 (a)	1965 (a)	1965 (s)
Mauritius	1970 (d)	1970 (d)	1970 (d)	1970 (d)	1970 (d)
Nigeria	1961 (d)	1961 (d)	1961 (d)	1971 (a)	
Senegal	1961 (a)*	1961 (a)	1961 (a)*	1961 (a)	
Sierra Leone	1962 (d)	1962 (d)	1962 (d)	1966 (a)	1963 (s)
Swaziland	1970 (a)	1970 (a)		1970 (a)	
Tunisia	1958 (s)	1958 (s)	1958 (s)	1958 (s)	
Uganda	1964 (a)	1964 (a)	1964 (a)	1964 (a)	1964 (s)

Legend:

(s) - signed but not ratified
(a) - accession
(d) - notification of succession
* - On June 9th, 1971, the Government of Senegal communicated to the Secretary General its denunciation of these two Conventions. See 781 UNTS 332, Nos. 7477 and 8164. See also Communication by the Government of the United Kingdom in reply thereto in 854 UNTS 214, 220.

Source: Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions. UN Publication Sales No. E.

Appendix Two

Index to African states' participation at UNCLOS III

UNCLOS SESSION	SC I	1st II	2nd III	3rd IV	4th V	5th VI	6th VII	7th VIII	8th	9th X	10th XI	11th XII	OH	Date of Sig.	R/C/A
Algeria	X		X	X	X	X	X	X	X	X	X	X	VP	10:12:82	
Angola						X	X	X	X	X	X	X		10:12:82	
*Benin		X	X	X	X	X	X	X	X	X	X	X		30:8:83	
*Botswana			X	X	X	X	X	X	X	X	X	X		5:12:84	
Burkina Faso			X	X	X	X	X	X	X	X	X	X		10:12:82	
Burundi			X	X				X	X	X	X	X		10:12:82	
Cameroon	X		X	X	X	X	X	X	X	X	X	X	C/CI	10:12:82	19:11:85
Cape Verde					X	X	X	X	X	X	X			10:12:82	
Cent. Afr. Rep.		X	X	X	X	X			X	X	X			4:12:84	
Chad					X	X	X	X			X	X	CC	10:12:82	
Congo	X		X	X	X	X	X			X	X	X		10:12:82	
Djibouti										X	X	X		10:12:82	
Egypt	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	26:8:83
*Equitorial Guinea			X		X	X	X					X		30:1:84	
Ethiopia	X		X	X	X	X	X	X	X	X	X	X		10:12:82	
Gabon	X		X	X	X	X	X	X	X	X	X	X		10:12:82	
Gambia			X	X	X	X	X		X			X		10:12:8 2	22:5:84
Ghana	X	X	X	X	X	X	X	X	X	X	X	X	D.C.	10:12:82	7:6:83
Guinea	X		X	X	X	X	X				X			4:10:84	6:9:85
Guinea Bissau		X	X	X	X	X	X	X	X	X	X	X		10:12:82	
Ivory Coast	X		X	X	X	X	X	X	X	X	X	X	C.C.	10:12:82	26:3:84
Kenya	X	X	X	X	X	X	X	X	X	X	X	X	VC/CII	10:12:82	
Lesotho			X	X	X		X		X	X	X	X	D.C.	10:12:82	
Liberia	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	
Libya	X	X	X	X	X	X	X	X	X	X	X	X		3:12:84	
Madagascar	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	25:2:83	
Malawi	X				X	X				X	X			7:12:84	
Mali		X	X	X	X		X	X	X	X	X			19:10:83	16:7:85
Mauritania	X		X	X	X	X	X	X		X	X	X	D.C.	10:12:82	
Mauritius	X		X	X	X	X	X	X		X	X	X	D.C.	10:12:82	
Morocco	X		X	X	X	X	X	X		X	X	X		10:12:82	
Mozambique					X	X	X	X	X	X	X	X		10:12:82	
Namibia					X		X	X		X		X		10:12:82	18:4:83

Niger		X		X	X	X	X	X	X	X	X	X		10:12:82	
Nigeria	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	
Rwanda					X	X	X			X	X	X		10:12:82	
Sao Tome & Principe								X	X	X	X			13:7:83	
Senegal	X	X	X	X	X	X	X	X	X	X	X	X		10:12:82	25:10:84
Seychelles								X	X	X	X	X		10:12:82	
Sierra Leone	X	X	X	X	X	X	X	X	X	X	X	X	D.C.	10:12:82	
Somalia	X	X		X	X	X	X	X	X	X	X	X		10:12:82	
Sudan	X	X	X	X	X	X	X	X	X	X	X	X	R.CIII	10:12:82	23:1:85
Swaziland			X	X	X	X		X	X	X	X			18:1:84	
Tanzania	X	X	X	X	X	X	X	X	X	X	X	X	D.C.	10:12:82	30:9:85
Togo			X	X	X	X	X				X	X		10:12:82	16:4:85
Tunisia	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	24:4:85
Uganda		X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	
*Zaire	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	22:8:83	
Zambia	X	X	X	X	X	X	X	X	X	X	X	X	V.P.	10:12:82	7:3:83
Zimbabwe											X	X		10:12:82	

Explanation:
* These countries are signatories to the Final Act in addition to those who signed on 10:12:82.

OH - Office Held

VP - Vice President; C/CI - Chairman, Committee I; CC - Credentials Committee; DC - Drafting Committee; VC/CII - Vice Chairman, Committee II; R.CIII - Rapporteur, Committee III.

R,C,A - Ratification, Confirmation, Accession

Source: Column I: - UN DOC. A/AC. 138.

Column II - 13: - A/CONF. 62/INF. 1 to 7 including all Revisions and Addenda.

Columns 14, 15: - Treaties in respect of which the Secretary-General performs Depository Functions (1984).

Appendix Three

Main Access to the Sea for African Landlocked States

	Originating point	Transit		Distance in kilometres	Means
		Port	Country		
Africa					
Botswana	Gaborone	Capetown	South Africa	1 400	*Rail*
	Gaborone	Maputo	Mozambique	1 400	*Rail*
	Gaborone	Port Elizabeth	South Africa	1 200	*Rail*
	Gaborone	Durban	South Africa	1 100	*Rail*
Burundi	Bujumbura	Dar es Salaam	Tanzania	1 455	*Rail and water*
	Bunjunbura	Mombasa	Kenya	1 850	*Road and rail*
Central African Rep.	Bangui	Pointe-Noire	Congo	1 815	*Rail and water*
	Bangui	Douala	Cameroon	1 400	*Road and rail*
Chad	N'Djamena	Lagos	Nigeria	2 000	*Rail and road*
	Moundou	Port Harcourt	Nigeria	1 500	*Water and road*
	N'Djamena	Douala	Cameroon	2 000	*Rail and road*
	Moundou	Douala	Cameroon	1 715	*Rail and road*
	Sarh	Douala	Cameroon	2 015	*Rail and road*
Lesotho	Maseru	Durban	South Africa	740	*Rail*
		East London	South Africa	800	*Rail*
Malawi	Blantyre	Beira	Mozambique	560	*Rail*
	Blantyre	Nacala	Mozambique	700	*Rail*
Mali	Bamako	Dakar	Senegal	1 289	*Rail and road*
	Bamako	Abidjan	Ivory Coast	1 250	*Road and rail*
	Bamako	Abidjan...	Ivory Coast through Upper Volta	1 170	*Road and rail*
Niger	Niamey	Cotonou	Benin	1 060	*Road and rail*
	Zinder	Abidjan	Ivory Coast	2 690	*Road*

	Niamey	Abidjan	Ivory Coast	1 690	*Road and rail*
	Zinder	Cotonou	Benin	1 700	*Road and rail*
	Niamey	Lome	Togo	1 225	*Road*
	Zinder	Lome	Togo	225	*Road*
Rwanda	Kigali	Dar es Salaam	Tanzania	1 750	*Road, water and rail*
	Kigali	Mombasa	Kenya	1 790	*Road and rail*
Swaziland	Mbabane	Maputo	Mozambique	220	*Rail*
		Durban	South Africa	500	*Rail and road*
Uganda	Kampala	Mombasa	Kenya	1 450	*Rail and road*
Upper Volta	Ouagadougou	Abidjan	Ivory Coast	1 210	*Road*
	Ouagadougou	Abidjan	Ivory Coast	1 150	*Rail*
	Ouagadougou	Lome	Togo	1 000	*Road*
	Ouagadougou	Tema	Ghana	900	*Road*
Zambia	Lusaka	Beira and Nacala	Mozambique (via Malawi)	2 570	*Rail*
	Lusaka	Dar es Salaam	Tanzania	2 000	*Road*

Source: A transport strategy for land-locked developing countries: report of the Expert Group on the Transport Infrastructure for Land-locked Developing Countries (United Nations publication Sales No. E.74.II.D.5), updated by the UNCTAD secretariat.

Appendix Four

A Survey of Selected African Coastal States' Requirements for Foreign Fishing in National Waters.

Country	Foreign Fishing Vessels' Licensing Conditions and Other Requirements	Some Bilateral Agreements on Fishing
Angola	Foreign fishing authorization may be granted within the framework of negotiations. agreements and contracts concluded by members of the government. Conservation measures may be imposed as conditions of licence, which licence is to be carried on board vessel - National flag and registration number to be clearly displayed. No direct reference to licence fees. Penalty for unauthorized foreign fishing: fines upwards of $1688 U.S. or forfeiture of gear and catch as ordered by the court Decree on the Protection of Marine Resources, No. 12-A/80. Art. 5 & 6.	1) Agreement with U.S.S.R.-Angolan operations; 2) Agreements with Cape Verde, 1981, vessels of Cape Verde to fish in Angolan waters from Oct. to May when there is shortage of tuna in Cape Verde's waters; 3) Agreement with Nigeria, 1982, Experimental fishing by vessels from Nigeria for an initial period of 90 days in specified areas of Angolan Fishing Zone. To employ 4 Angolans as crew; and 4) Agreement with Spain, 1984 for Crustaceans and finfish, in exchange for 40 scholarships.

Benin	Foreign fishing in territorial waters reserved for foreign vessels holding Benin authorization, or on the basis of reciprocity. Vessels licenced for industrial fishing must be owned by a Company having its head office in Benin, with accounts there or by a physical person either residing or represented there. vessels must be not more than 7 years old. Licence holder must pay $667 U.S. to $1333 U.S. per boat depending on tonnage. Penalty for unauthorized fishing fines up to $10,811 U.S., 10 to six months in prison or upon a second offence, forfeiture of vessel, gear and Art. 8, Ordinance No. 76-92, 1976, Art. 2.	Nigerian and Benin vessels operate in each others' zones by virtue of unwritten reciprocal agreements.
Gabon	Fishing in rivers, lagoons, estuaries and within three miles of the coast is restricted exclusively to artisanal fisheries. Penalty for unauthorized fishing: fines up to $13,514 U.S., 1-6 months imprisonment or upon a second offence within a period of two years, seizure and sale of vessel, gear and catch as ordered by a court. Law No. 1/82 of 1982.	Agreement granting reciprocal fishing rights with Congo in 1982. Agreement with the Republic of Korea, Dec. 1984 for 350 ton trawler to fish between Jan., 1985 to July, 1985 against payment of $8500.

Gambia	Conditions for licensing foreign vessels may include: location, method and conduct of fishing operations, size of catch, and conservation measures to be adopted; landing, marketing and processing of catch, transfer of technology among others. Penalty for unauthorized foreign fishing: fines up to $233 000 U.S., imprisonment up to 2 years or forfeiture of vessel, gear and catch as ordered by the court.	Agreement with Senegal, 1982, valid for 2 years and renewable on tacit understanding, providing for reciprocal fishing rights; fishing rights for industrial vessels, however, to be determined annually by mixed commission.
Ghana	Foreign fishing restricted to tuna fisheries. Foreign tuna companies reqired to enter into 50/50 joint ventures with Ghanaian Companies on the understanding that Ghanaian partners will eventually assume full ownership. All tuna vessel catch to be landed in Ghana before transhipment or export thereof, 10% of which must be offered for sale to local canneries. Export permits required for all species to be transhipped by licensed vessels. Written returns to be submitted concerning the operations of the vessel as required by the licensing officer. Penalty for unauthorized foreign fishing, on summary conviction, up to $18000 U.S., imprisonment up to 2 years and court may order forfeiture of vessels, gear and catch. Fisheries Decree 1979, Art. 7, 8.	

Guinea	Access agreements for foreign vessels may include a provision establishing the responsibility of the foreign government or entity to take necessary measures to ensure compliance by its vessels with the agreement and relevant fishing laws. Penalty for unauthorized foreign fishing, fines up to $9730 U.S., forfeiture of vessel, gear and catch as ordered by the court. Code de la Peche Maritime, 1985.	Framework agreement with Ghana 1978 for joint fishing operations and formation of one joint venture. Agreement with Nigeria, August, 1981, valid for 5 years, each vessel paying an annual tax of $7920 U.S. Agreement with Spain, April, 1984, valid for 3 years and renewable for a 3 monthly period. Payment in the form of supply of industrial trawlers and seiners.
Ivory Coast	Number of foreign vessels in territorial sea is limited to 25. Special authorization required for sardine boats and longlines which must be less than 7 years old. Shrimp trawlers must also be especially authorized. Order 1067 of 1970.	Liberian-Ivorian cooperation agreement granting reciprocal fishing rights for three bonafide Liberian and Ivorian vessels. No fees required.
Kenya	Foreign fishing vessels to be licensed to fish in EEZ on such terms and conditions as specification of age, size of fish and species to be caught, information required by vessels, placing Kenyan observers on such vessels, landing of catch in Kenyan posts, joint venture, and or other cooperative ventures and arrangements. Penalty for unauthorized foreign fishing, fines up to $2000 U.S., 2 years imprisonment or forfeiture of vessel, gear and catch as ordered by the court.	No information.

Mozambique	Minister of Industry and Energy empowered to establish conditions for licensed fishing operations. Foreign vessels must fly national flag and display registration number. They are also subject to inspection and control by competent maritime authorities, which inspection may cover fishing gear, catch, sonar, records and logbooks. Merchant Marine and Maritime Fisheries Code, (1978).	No information.
Mauritania	Foreign vessels are subject to the same conditions as national vessels with respect to conservation measures, fishing gear, etc. Most foreign vessels are, however, under time-charter to Mauritanian-based companies, under which about 31% of demersal and pelagic catch are supplied to Mauritanian companies. Penalties for unauthorized foreign fishing range on an escalating scale according to gross tonnage, up to $2 million U.S. Upon second offence, seizure and sale of gear and catch may be ordered by the Minister responsible for Fisheries.	Many bilateral agreements with Spain and Senegal. For example, agreement in 1982 with Spain allowing up to 25 Spanish vessels to fish for octopus in waters beyond 6 miles from the coast. 1981 Agreement with the Republic of Korea for fishing.

Source: F.A.O., Legislative Study, No. 21, Rev. 1 & 2. Coastal State Requirements for Foreign Fishing.